

Transcript, Meeting of the Minnesota Public Utilities Commission
April 8, 2003
PUC Docket No. P-421/C-02-197

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1 BEFORE THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF MINNESOTA

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10 In the Matter of the Consideration
11 of Petitions for Reconsideration
12 of the Complaint of the Minnesota
13 Department of Commerce Against
14 Qwest Corporation Regarding Unfiled
15 Agreements

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PUC Docket No: P-421/C-02-197

Minnesota Public Utilities Commission
350 Metro Square Building
121 Seventh Place East
St. Paul, Minnesota
Large Hearing Room
April 8, 2003

Met, pursuant to notice, at 9:30 in the
morning.

COURT REPORTER: Angie D. Threlkeld, RPR CRR

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CHAIR KOPPENDRAYER: Good morning.

Welcome to the commission. It's April 8th. Our
agenda consists of telecom and issues pertaining to
the commission's consideration of the Qwest 271
filing.

Mr. Oberlander, if you'll introduce our
agenda for us.

MR. OBERLANDER: Good morning,
Commissioners. Commissioners, item number 1 is
consideration of petitions for reconsideration in
the Qwest unfiled agreements case. That's Docket
02-197.

And the second item on the agenda today
is consideration of all matters regarding Qwest's
271 application to the Federal Communications
Commission. For the record that's Dockets 01-1370,
01-1371, 01-1372, 01-1373, 01-1375, and 01-1376.

Commissioners, commission staff would
recommend that the commission treat each of these
two items individually.

CHAIR KOPPENDRAYER: Thank you.

22 Questions of Mr. Oberlander?
23 Mr. O'Grady.
24 MR. O'GRADY: I would just note,
25 Chairman, that Mr. Brian Thomas of Time Warner is on

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1 the speaker phone listening. I believe that's the
2 only outside party.
3 CHAIR KOPPENDRAYER: Mr. Thomas, can you
4 hear us?
5 MR. THOMAS: Yes.
6 CHAIR KOPPENDRAYER: You wanted the
7 telephone connection for the sake of hearing the
8 procedure, but you didn't plan to comment?
9 MR. THOMAS: Correct.
10 CHAIR KOPPENDRAYER: Thank you.
11 I can see that we've been on this issue
12 too long, because even without asking the parties to
13 come forward they've all found their usual seats.
14 We must have done this before. However, for the
15 record we will start over here. And, Ms. Lehr, if
16 you want to start; and then we'll introduce
17 ourselves for the record.
18 MS. LEHR: Lesley Lehr, MCI/WorldCom.
19 MS. LIETHEN: Rebecca Liethen, Time
20 Warner Telecom.
21 CHAIR KOPPENDRAYER: Liethen?
22 MS. LIETHEN: Liethen.
23 COMMISSIONER JOHNSON: Would you spell
24 it, please?
25 MS. LIETHEN: L-I-E-T-H-E-N.

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1 MR. WILMES: Greg Wilmes, New Access
2 Communications.
3 MR. DOYLE: Greg Doyle, Department of
4 Commerce.
5 MR. ALPERT: Steve Alpert representing
6 the Department of Commerce.
7 MR. WITT: Gary Witt with AT&T.
8 MR. LIPSCHULTZ: Dan Lipschultz
9 representing McLeod.
10 MR. BRADLEY: Mike Bradley representing
11 the CLEC coalition.
12 MR. TOPP: Jason Topp, Qwest.
13 MR. CRAIN: Andrew Crain, Qwest.
14 MR. AHLERS: Dennis Ahlers, Eschelon.
15 CHAIR KOPPENDRAYER: The first item on
16 our agenda relates to the unfiled agreements as it
17 pertains to the public interest portion of the 271
18 filing. That was considered once and has been --
19 reconsideration has been requested. The order that
20 went out all four of the commissioners present voted
21 in favor of that motion. So any commissioner is
22 eligible to make a motion as to whether or not to
23 have a reconsideration of Item 1.
24 COMMISSIONER SCOTT: Mr. Chair.
25 CHAIR KOPPENDRAYER: Commissioner Scott.

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1 COMMISSIONER SCOTT: I would like to tell
2 my colleagues what I'm thinking first before I make
3 any motions or do anything, and get some feedback
4 from you. My thought is this: I think that the
5 commission should reconsider on its own motion. I
6 would not grant the motions of any of the parties
7 because I do think we should do some tightening and
8 some tinkering.

9 In particular I would -- I've got the
10 order out in front of me here just so people can be
11 oriented. And I have page 21 in particular of the
12 order. If -- Generally I think of what we did is we
13 gave some past relief; we gave some forward relief;
14 and we calculated a fine, a penalty that we then
15 essentially stayed.

16 What I would have us do today is delete
17 the forward relief and impose the penalty. So
18 essentially I would be -- on page 21 I'd be deleting
19 paragraph 4 of our order that provides for the
20 discount going forward, and I would delete paragraph
21 5 that stays the penalty. And then in paragraph 6
22 I'd put a period after the first sentence because
23 the rest of paragraph 6 deals with the future
24 relief, which I would eliminate.

25 And then I think the one other thing that

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1 I would suggest we tinker with is in paragraph 3A,
2 the dates for the past relief, the period of time
3 for the past relief. We had chosen 24 months. I'd
4 like to hear from folks about whether a different
5 period of time is more appropriate, again just to
6 tighten up the record. In particular I'm thinking
7 that from the November 15th, 2000 date is a good
8 date through then something like March of 2002 when
9 the gig was up. At some point the gig became up.

10 And so, again, that's what I'm thinking
11 that we should do. But I would do it as on the
12 commission's own motion so the commission could
13 consider it and specifically direct the discussions
14 and we don't go off in all kinds of directions. So
15 that's what I'm thinking.

16 CHAIR KOPPENDRAYER: Any questions or
17 discussion?

18 COMMISSIONER JOHNSON: Mr. Chair.
19 Commissioner Scott, what date --

20 CHAIR KOPPENDRAYER: Commissioner
21 Johnson.

22 COMMISSIONER JOHNSON: -- more particular
23 then are you thinking?

24 COMMISSIONER SCOTT: Pardon me?

25 COMMISSIONER JOHNSON: What specific date

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1 are you -- You must have a date --

2 COMMISSIONER SCOTT: You know --

3 COMMISSIONER JOHNSON: -- in mind.

4 COMMISSIONER SCOTT: -- I remember that
5 there were a number of dates. Qwest had a date.

6 The CLECs had a date. The March date I think is the
7 most -- probably the most conservative date in terms
8 of the appellate courts looking at this.

9 COMMISSIONER JOHNSON: And how many
10 months is that?

11 COMMISSIONER SCOTT: Because that's when
12 the gig was up. That's when the agreements were
13 terminated and the whistle was blown.

14 COMMISSIONER JOHNSON: Right.

15 COMMISSIONER SCOTT: So it would be a
16 hard date to quarrel with.

17 COMMISSIONER JOHNSON: And how many
18 months is that?

19 COMMISSIONER SCOTT: That's 16 months.

20 COMMISSIONER JOHNSON: Yeah. Thank you.

21 COMMISSIONER SCOTT: 16 instead of 24.

22 COMMISSIONER JOHNSON: Right. Thank you
23 very much.

24 COMMISSIONER SCOTT: And let me be clear
25 about why -- why I'm doing this. My concern about

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1 the forward relief is that, upon reflection, even
2 though Eschelon and McLeod we know received millions
3 of dollars worth of payments when the agreements
4 were terminated, we don't have a record as to what
5 it was for. And it's clear that Eschelon and McLeod
6 now are motivated to say that it was for things that
7 maybe our forward relief wasn't reflecting.

8 And so my sense is we'd be better off
9 just to take that issue out of our order and,
10 frankly, from an administrative standpoint, trying
11 to administer that forward looking relief, which
12 seemed like it might be a nightmare, and instead say
13 we keep the backward relief and we impose the
14 penalty instead of staying the penalty. Because we
15 still give relief to the CLEC community, and we
16 still send a strong message to Qwest that this is
17 bad behavior; but we eliminate, I think, a
18 potentially troublesome appellate issue.

19 COMMISSIONER REHA: Mr. Chair.

20 CHAIR KOPPENDRAYER: Commissioner Reha.

21 COMMISSIONER REHA: I just have to
22 comment that I'm amazed because it's very close to
23 where I was going to propose in terms of
24 modification. And I agree that we should -- we
25 should do it on our own motion, Mr. Chair.

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1 CHAIR KOPPENDRAYER: The only thought I
2 have on it is that I -- it changes the perspective,
3 because I had a different perspective. But what I
4 didn't like about our previous motion after further
5 consideration was the cash portion of the look back,
6 cash or credit, because I -- cash doesn't promote
7 competition. Cash just pays somebody for not being
8 at the table. And I thought it should all be
9 credit. However, I don't have a problem with the
10 recommendation.

11 So I guess on those specifics, if one of
12 the parties or all of the parties want to comment on
13 specific items that have been open for
14 reconsideration.

15 COMMISSIONER REHA: There was one other
16 issue, Mr. Chair, that -- and that was the access,
17 \$2 access charge in that particular part of the
18 order. Commissioner Scott --

19 COMMISSIONER SCOTT: That's 3B.

20 COMMISSIONER REHA: Yes.

21 CHAIR KOPPENDRAYER: Well, it was 2 and 3
22 and \$16.

23 COMMISSIONER SCOTT: 16, yeah.

24 COMMISSIONER REHA: All of 3. Okay.
25 That's fine.

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1 CHAIR KOPPENDRAYER: 3B is \$2.

2 COMMISSIONER SCOTT: I'm fine with 3B,
3 3C, and 3D because it's part of the backward-looking
4 relief.

5 COMMISSIONER REHA: Okay.

6 COMMISSIONER SCOTT: Even though 3B uses
7 credits against future purchases as the
8 compensation, the analytical framework is backward
9 looking.

10 COMMISSIONER REHA: Okay.

11 CHAIR KOPPENDRAYER: As long as it's all
12 backward.

13 COMMISSIONER JOHNSON: Well, Mr. Chair,
14 I'd just like to weigh in on this too. I'm in favor
15 of this. I think it's much cleaner, and it gives
16 the relief that we have to give to make competition
17 even in the backward side of it. And going forward
18 we could see nothing but problems. So I think this
19 is a very good resolve. And I'm for the 16 months
20 as well. So I don't know why we can't just make a
21 motion and do it.

22 CHAIR KOPPENDRAYER: Well, I would -- I
23 would -- you know, with the other -- if the other
24 commissioners agree, I would also -- as long as
25 we're hearing comments on this specific issue, I

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1 would like to also hear the comments on the cash
2 and/or credit, and I would like to hear comments on
3 credit only.

4 COMMISSIONER JOHNSON: Okay.

5 COMMISSIONER SCOTT: I don't mind. I
6 disagree with your analysis on that, but I don't
7 mind hearing comments. Remember, this is -- this is
8 an environment where RBOCs went to the FCC and said,
9 There's other places these people can get these
10 things; they don't need to get them from us anymore.
11 That -- That is not conducive with saying credit is
12 the answer. I mean, they are saying go buy it from
13 someone else. The policy has shifted to go buy it
14 from someone else. What we want to encourage is
15 folks to go buy it from someone else, I guess.

16 That's cash, not credit. But -- But I don't mind
17 hearing it.
18 So maybe what we should do is I should
19 formally move on the commission's own motion that we
20 reconsider along the lines that we've discussed, and
21 then we can hear from the parties. And so I'll so
22 move.
23 CHAIR KOPPENDRAYER: All in favor --
24 COMMISSIONER REHA: Aye.
25 CHAIR KOPPENDRAYER: -- signify by saying
0012 aye.
1 ALL COMMISSIONERS: Aye.
2 CHAIR KOPPENDRAYER: Motion carries 4/0.
3 Mr. Topp.
4 MR. TOPP: I just wanted to make a few
5 comments regarding the proposal. It certainly, I
6 think, goes in the right direction towards reaching
7 a result that would be appropriate.
8 Some -- Some major concerns I'd like to
9 raise. The first is on the \$13 and \$16 credit. The
10 way the order reads in paragraphs 3C and 3D it's
11 that Qwest provides a \$13 credit or a \$16 credit.
12 The deals that were reached and that are of record
13 in this proceeding provided for a credit of \$13 or
14 \$16, which was offset by the amount that the CLEC --
15 or Eschelon in this case was able to bill. And the
16 actual payments that were made as a part of those
17 agreements were substantially lower, in the 2 to \$3
18 range, as opposed to \$13 and \$16. And so the
19 credits if -- or if given as ordered would be
20 inconsistent with the agreement that was reached and
21 would go far beyond what the actual agreements are.
22 As to the time frame, I think if you're
23 going to take the approach -- obviously we would
24 contest going beyond 251 services, but we -- the
0013 16-month time frame probably is the, you know, most
1 defensible time frame that the commission could go
2 with. We certainly would suggest that credit would
3 be the appropriate way to go on this stuff.
4 And if you give me a moment, it's
5 definitely shifted gears from my original
6 presentation.
7 COMMISSIONER SCOTT: It would be nice if
8 there was some way to give people a heads up,
9 but there --
10 MR. TOPP: Understood.
11 COMMISSIONER SCOTT: -- just isn't, you
12 know. So.
13 MR. TOPP: Understood. Finally, the fine
14 you're talking about imposing here is four times the
15 largest fine the FCC has ever imposed. We would
16 certainly take the view that that would be an
17 excessive fine.
18 On the \$2 issue, one of the prerequisites
19 was -- of the agreement was that the CLEC needed to
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21 demonstrate that it did not have the proper records
22 to bill Qwest for intraLATA toll termination. Also
23 in certain circumstances CLECs have issued bills
24 under the AT&T agreement in which they have issued
25 bills which are residual in which they have taken

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1 all of the traffic that's been terminated to them
2 and charged that at the termination rate, and the
3 bills still wind up being lower than the \$2 per line
4 figure. And so I would suggest that the \$2 figure
5 would be -- it would either be \$2 or the amount that
6 the CLEC has actually billed.

7 CHAIR KOPPENDRAYER: So, Mr. Topp, what I
8 hear you saying about this particular suggestion at
9 this point is that two -- two -- I believe, you
10 know, my -- if my recollection is correct, it was --
11 it was the commission's intent to -- at least to the
12 degree possible, that the look back, that the
13 benefit compensated for to those that didn't
14 participate should match in the look back that which
15 was given. And you're saying that the wording and
16 the way this order is laid out it goes beyond what
17 was -- what the benefit was to McLeod and Eschelon.
18 Because of how this is worded here --

19 MR. TOPP: Clearly --

20 CHAIR KOPPENDRAYER: -- it goes beyond.

21 MR. TOPP: Clearly that's the case on the
22 \$13 and \$16 piece. On the \$2 piece we would argue
23 that it would be inappropriate to give this \$2
24 benefit if CLECs have charged less than that using
25 the most expansive interpretation that they can come

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1 up with. But -- So we would argue that the 13 and
2 \$16 is clearly in excess.

3 CHAIR KOPPENDRAYER: Then one other
4 question. My idea in looking at this and looking
5 back at it or reopening it was to hopefully get to
6 an equitable settlement, get to a point where a
7 settlement was agreed on, and we could go forward
8 with a 271 recommendation. So -- And, Commissioner
9 Scott, I don't want to take any words out of his
10 mouth; but his goal here was to say, Look, this is a
11 more defensible position if and when Qwest appeals
12 our order.

13 Let me ask you this from my perspective:
14 If this wording were such that it -- that it
15 accomplished what you and I just talked about, that
16 it was the same as the benefit given to McLeod and
17 Eschelon in the past, that same benefit was awarded
18 to those that didn't get to participate and the
19 order was worded such, the penalty is understood,
20 the payment that -- the monetary penalty is
21 understood, do we get to the point that I was hoping
22 we would get to? In other words, could we say,
23 Okay, this I think is an equitable settlement; we
24 can agree to it; and we'll go forward with a 271
25 recommendation?

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1 MR. TOPP: Let me consult.
2 COMMISSIONER REHA: Maybe they want to
3 take a --
4 COMMISSIONER JOHNSON: Maybe we should --
5 COMMISSIONER REHA: -- five-minute break.
6 COMMISSIONER JOHNSON: -- take a break.
7 CHAIR KOPPENDRAYER: Pardon?
8 COMMISSIONER JOHNSON: Maybe you should
9 take a break.
10 COMMISSIONER SCOTT: Well, we got to hear
11 from other people.
12 COMMISSIONER JOHNSON: Yeah, but they're
13 in a -- might settle the damn thing.
14 CHAIR KOPPENDRAYER: If you want ten
15 minutes to call somebody, I'll give you that.
16 MR. TOPP: There's probably going to be
17 two key hurdles. The first is the two-fifty --
18 going beyond 251 services on the 10 percent. The
19 second is I --
20 COMMISSIONER JOHNSON: Explain yourself
21 on that.
22 MR. TOPP: Well, it's our view that this
23 commission has the ability to set rates or make
24 remedial determinations with respect to 251
25 services. To concede that the commission has the

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1 ability to go beyond that is a legal position that
2 would have ramifications for us quite broadly and
3 that we would be very concerned about. And so --
4 CHAIR KOPPENDRAYER: But that's not in
5 the -- That's not in the unfiled agreements. That's
6 in the -- in the --
7 MR. TOPP: Yeah, it is.
8 CHAIR KOPPENDRAYER: -- SGAT.
9 COMMISSIONER SCOTT: No.
10 MR. TOPP: It's in the unfiled
11 agreements.
12 COMMISSIONER REHA: It's in --
13 COMMISSIONER SCOTT: It's in there.
14 COMMISSIONER REHA: It is in the unfiled.
15 COMMISSIONER SCOTT: Why don't you be
16 specific?
17 CHAIR KOPPENDRAYER: But it was also in
18 -- Okay.
19 COMMISSIONER SCOTT: You're okay with
20 this relief and this relief and this relief; you're
21 not okay with that relief.
22 MR. TOPP: Yeah.
23 COMMISSIONER SCOTT: Be specific.
24 MR. TOPP: Well, what I'm trying to say
25 is the two pieces that we would have concern with is

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1 the 10 percent going beyond the 251, 252 services.
2 COMMISSIONER SCOTT: What does that mean?
3 You have to tell people what that means in your
4 view.

5 MR. TOPP: What that means is that we
6 would agree and we have proposed that we would give
7 a 10 percent discount on 251 and 252 services. To
8 the extent that it goes beyond that --
9 COMMISSIONER SCOTT: You keep saying the
10 same thing though, Jason. What does it mean to say
11 something is a 251 or a 252 service? That's what
12 you need to explain.
13 MR. TOPP: That we would not pay
14 10 percent on access. That we would not pay
15 10 percent to IXC's.
16 COMMISSIONER SCOTT: Was access and IXC
17 included in the Eschelon and McLeod agreements?
18 MR. TOPP: Access was included. It was
19 an agreement with the CLEC.
20 COMMISSIONER SCOTT: Yeah.
21 COMMISSIONER REHA: That's right.
22 COMMISSIONER JOHNSON: You have to pay
23 it.
24 MR. TOPP: We would have a concern on
25 that issue. The second piece that we would have a
0019 concern on is in our view, you know, the fine amount
1 it could be okay. We'd like to see some or -- you
2 know, a portion of that stayed.
3 COMMISSIONER SCOTT: Let me just ask you
4 something.
5 CHAIR KOPPENDRAYER: It would be okay,
6 but you would like it stayed?
7 MR. TOPP: We believe that that fine is
8 extraordinary, and we would like to see -- You know,
9 we're not advocating that the commission get rid of
10 that fine amount; but we would like to see a portion
11 of that stayed pending, you know, our compliance of
12 the commission's order.
13 COMMISSIONER JOHNSON: But, Mr. Topp, how
14 could we not give access? How could we not give
15 that discount backwards to the others if you granted
16 it to the other two? I mean, that just would not be
17 fair. I don't see how you could defend that in
18 court. It just -- just doesn't fly.
19 MR. TOPP: The issue of what would happen
20 with respect to access rates, in our view, is an
21 issue not to be considered by this commission. That
22 doesn't mean that there's not other authority for
23 considering that issue, but we do not think that
24 it's appropriate to consider as a part of these
0020 interconnection agreements.
1 CHAIR KOPPENDRAYER: Well, it can be
2 considered by this commission as a means of penalty
3 though.
4 COMMISSIONER REHA: Don't forget,
5 Mr. Topp, that this is -- these are considered to be
6 restitutional --
7 CHAIR KOPPENDRAYER: Yeah.
8 COMMISSIONER REHA: -- penalties, and we
9

10 have the authority under state law, as I interpret
11 it and read it and as our legal counsel has given us
12 advice also. And so I -- To me the position that
13 this goes beyond 251, 252, the fact that we're in
14 the state jurisdiction we have authority under our
15 state law to -- to frame and fashion a restitutional
16 penalty. To me I don't think you're going to be
17 successful in litigating that issue.

18 CHAIR KOPPENDRAYER: And that was my
19 point. It's -- The commission can impose it as a
20 restitution but not on a forward basis if the
21 authority isn't ours to set those rates on a
22 going-forward basis. But as a restitution, because
23 it was agreed to in the past, it can be imposed as a
24 penalty.

25 COMMISSIONER JOHNSON: Yeah, right.

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1 MR. TOPP: The only thing -- I mean, this
2 is a lost -- a complaint brought under -- for
3 violations of 251 and 252. Pursuant to 251 --

4 COMMISSIONER REHA: And state law also,
5 Mr. Topp.

6 MR. TOPP: And state law. But
7 discrimination obligations under two -- We have an
8 obligation with respect to 251 and 252 services.
9 Other services we do not have an obligation to --

10 COMMISSIONER JOHNSON: You better have
11 another huddle. That one you can't win. I mean,
12 just give in on it.

13 CHAIR KOPPENDRAYER: Mr. Crain.

14 MR. CRAIN: Our position -- And this case
15 is being brought pursuant to our obligations to
16 treat CLECs and the services we provide to CLECs
17 under Section 251 and 252 in a nondiscriminatory
18 fashion. That is --

19 COMMISSIONER SCOTT: And state law, as
20 Commissioner Reha said before.

21 MR. CRAIN: And state law.

22 COMMISSIONER REHA: Right. And --

23 COMMISSIONER SCOTT: You seem to just
24 kind of push that part off.

25 COMMISSIONER REHA: Yeah. And we --

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1 MR. CRAIN: But even this --

2 COMMISSIONER REHA: We affirmed the ALJ's
3 decision straight up which found violations of state
4 and federal law here.

5 MR. CRAIN: But even the state law we're
6 talking about, we're talking about the services we
7 provide to CLECs. The obligations we may or may not
8 have regarding non251 and 252 services, nonlocal
9 services, are obligations that are imposed and
10 within the jurisdiction of federal authorities, not
11 the state commission. So to the extent we're --
12 This whole case is how do we -- is about how do we
13 treat CLECs and do we treat CLECs in a
14 nondiscriminatory fashion in provisioning local

15 services to them, in provisioning 251 and 252
16 services to them. There --
17 COMMISSIONER REHA: But your actions were
18 also anticompetitive --
19 COMMISSIONER JOHNSON: This is a --
20 COMMISSIONER REHA: -- as well as
21 discriminatory.
22 COMMISSIONER JOHNSON: -- serious thing,
23 you know.
24 MR. CRAIN: I understand -- I understand
25 this is serious. Nobody's talking about this being

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1 anything but serious. We've been here four or five
2 times. We're talking about a fine that goes well
3 beyond anything this commission's ever imposed; it
4 goes well beyond anything the FCC's ever been
5 imposed. We take this incredibly seriously. You're
6 talking about an issue of does this commission have
7 the authority to impose a -- a discount on services
8 over which it doesn't have jurisdiction and impose a
9 discount pursuant to our obligations to provide
10 local services in a nondiscriminatory fashion.
11 Using that obligation to impose a discount on other
12 services, that's what we don't think is appropriate
13 in this -- in this proceeding.

14 CHAIR KOPPENDRAYER: Well, Mr. Crain,
15 Commissioner Scott and Commissioner Reha are trained
16 in interpreting statutes like you are and are very
17 good at it like you folks are. And if -- In this
18 case we can take a piece of federal law and
19 Minnesota law and we can argue the nuances of this
20 as it pertains to this particular case. But today
21 we're sitting here and I'm sitting here making --
22 making a suggestion that step out of that legal
23 framework for just a moment and look at yourself as
24 a company who wants to do business -- who has done
25 business and serves Minnesota, but wants to do that

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1 with the approval of this commission and the -- and
2 basically then that has -- has a -- an implication
3 of the approval of how you do business in Minnesota
4 in the media, et cetera, look at this from a
5 business perspective for a moment today and say, We
6 came to an agreement, we -- and to do business in
7 Minnesota from a business perspective, we want to
8 take this extra step and say, Yes, we'll do this,
9 and go out of here with a 271 recommendation, having
10 set this issue aside and leave out the legal
11 nuances.

12 Now, remember, I'm not an attorney, so
13 that might get you in all kinds of trouble. But I'm
14 trying to get you to where a business can do
15 business and look good to the public.

16 COMMISSIONER JOHNSON: And, Mr. Chair --

17 MR. CRAIN: And --

18 COMMISSIONER JOHNSON: -- I'd just like
19 to add one thing. I agree with him completely. And

20 then this would prove that the new Qwest is on board
21 and working.

22 MR. CRAIN: And there's nothing we would
23 rather do today than do that. I think one piece,
24 Chairman Koppendrayer, of what you said is what I'm
25 trying to -- what we're trying to avoid here is

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1 getting us in trouble in terms of the bigger
2 picture -- and believe me I know we got ourselves in
3 trouble -- but the bigger -- the bigger picture of
4 what we can agree to and what we can't agree to and
5 how that impacts other jurisdictions, how that
6 impacts precedent in the future. That is -- That is
7 what I'm -- what we're trying to work through here.

8 And what we'd like to do is take a
9 ten-minute break to caucus and see if there is
10 anything we can do.

11 COMMISSIONER REHA: Let me -- Let me just
12 say one thing. I know you're concerned about the
13 exposure you might have in other jurisdictions if
14 you concede this particular point. But other
15 jurisdictions don't have the same law that we have
16 in terms of what this commission can do. And
17 Minnesota Statute 237.461, Subdivision 1, provides
18 that Chapter 237 and rules and orders of the
19 commission may be enforced by any one or combination
20 of criminal prosecution action to recover civil
21 penalties, injunction action to compel performance,
22 and other appropriate action. And I think that you
23 could -- I haven't read every other state's laws
24 with respect to the imposition of penalties if
25 there's been a violation of state law, but I would

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1 venture to guess that our law is fairly strict and
2 probably more strict than a lot of other
3 jurisdictions on this point.

4 So, in my view, I think that we are
5 taking reasonable action and we can impose a penalty
6 or an enforcement or a restitutional action that
7 goes beyond 251 and 252 for a violation of state
8 law. And so I understand your concern and your
9 interest not to sort of by agreeing to this somehow
10 open yourself up in other jurisdictions to -- to,
11 you know, more serious consequences in the future;
12 but I really think that that risk is probably
13 minimal.

14 MR. TOPP: I think we -- it will take us
15 a good ten minutes. We're going to need to talk for
16 a while. I think one of the first questions we're
17 going to get though is whether there, in fact, is
18 support generally for this proposal or not. And I
19 think it would be worth hearing at least quickly
20 from the other parties --

21 COMMISSIONER REHA: Oh, I agree.

22 MR. TOPP: -- as to whether --

23 COMMISSIONER REHA: I --

24 MR. TOPP: -- there is or --

25 COMMISSIONER REHA: We can --
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1 MR. TOPP: -- is not.
2 COMMISSIONER REHA: I really want to hear
3 from everybody on this point. And I suspect there's
4 going to be some -- some objections to the direction
5 this commission seems to be going. But -- But I
6 think the purpose of what we want to do is we want
7 to look backward, try to level the playing field,
8 and try to make restitution to address the harm that
9 has been caused by the illegal actions of the
10 company. And that's what my intent is.
11 CHAIR KOPPENDRAYER: Well -- Commissioner
12 Scott.
13 COMMISSIONER SCOTT: Could I -- I'd like
14 the CLECs and the department to comment on this. It
15 seems to me that if the Qwest agreement with
16 Eschelon and McLeod had only related to access and
17 IXC revenue, even if you accept that it may not had
18 to have been filed under 251, 252, it still would
19 not preclude this commission from deciding that
20 special deals on access and IXC revenue is
21 anticompetitive. And, given that, I don't know what
22 you folks are doing with this issue.
23 COMMISSIONER REHA: And just so you know,
24 Mr. Topp and other members from Qwest here, is that,
25 you know, I might be willing to consider instituting
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1 the fine and then perhaps staying a portion of the
2 fine. I might consider that. But I'll have to see,
3 hear the other -- arguments of the other parties.
4 CHAIR KOPPENDRAYER: Mr. Lipschultz, you
5 want to go first?
6 MR. LIPSCHULTZ: No.
7 CHAIR KOPPENDRAYER: No?
8 MR. LIPSCHULTZ: Mr. Chair,
9 Commissioners, generally we would agree with and
10 support the direction you're headed in.
11 CHAIR KOPPENDRAYER: Thank you.
12 MR. LIPSCHULTZ: And the only -- And the
13 only caveat we would have from McLeod's perspective
14 is the access-related remedies, the 13 or \$16
15 remedy, which really relates to originating access
16 on UNE-P, and the \$2 per line remedy that really
17 relates to terminating access.
18 And just to point out -- and it wasn't
19 clear from your order whether this was clearly
20 understood -- but those payments were made to
21 Eschelon pursuant to unfiled agreements Eschelon had
22 with Qwest. McLeod didn't have those agreements,
23 have access to those agreements, or receive those
24 payments.
25 And with the caveat I think that Qwest
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1 suggested, that payments should be made but only to
2 the extent money has not already been received, I
3 think that's a reasonable remedy that ought to be

4 applied equitably to all who didn't receive those
5 payments, which would include McLeod. And with that
6 small caveat, I think we would support the direction
7 you're headed in.

8 COMMISSIONER SCOTT: That was fairly
9 smooth. Fairly smooth.

10 CHAIR KOPPENDRAYER: But let me add to
11 that that under this, what we are considering,
12 McLeod is out.

13 COMMISSIONER SCOTT: Yeah. I didn't move
14 to --

15 CHAIR KOPPENDRAYER: And --

16 COMMISSIONER SCOTT: -- reconsider it
17 McLeod. That's why --

18 CHAIR KOPPENDRAYER: And -- And if --
19 unless, which you have every right to, you appeal,
20 my idea of this then, we wouldn't take up the docket
21 looking at whether or not you're culpable because
22 you're out and that's your penalty, but you're out
23 completely.

24 MR. LIPSCHULTZ: And, Mr. Chair,
25 Commissioner, we understood that -- I certainly

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1 understood the direction you were headed in, which
2 was why I characterized my point as a caveat, and --
3 but understood that if this commission sees fit to
4 put this matter to rest, put it behind you, that's
5 certainly something McLeod would support and would
6 like to see happen. I can tell you that for sure.

7 CHAIR KOPPENDRAYER: And then there's no
8 but we want. Okay? You understand that?

9 MR. LIPSCHULTZ: Mr. Chair, I certainly
10 understand that. But just would put out for your
11 consideration before you make a final decision that,
12 in effect, to have a policy -- to make a policy
13 decision here that's equitable across the board that
14 holds to the principle that you ought to get what
15 you didn't get, if you do that, if you follow that
16 line and that policy, then McLeod would have access
17 to those access-related remedies and Eschelon would
18 not.

19 CHAIR KOPPENDRAYER: Well, but -- but,
20 Mr. Lipschultz, you make it really difficult for us
21 to find that equitable ground when we were looking
22 at settlements and then all of the sudden everybody
23 agrees that those really weren't settlements,
24 including McLeod, that -- So, you know, somebody
25 threw the ball up and everybody shot the other

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1 direction, including McLeod. So how are we to
2 determine what's equitable?

3 COMMISSIONER REHA: I -- I would like to
4 add that usually a party that is seeking an
5 equitable result has to come forward with -- with
6 clean hands. I think that's the general rule in
7 equity. And, unfortunately -- I know that you did
8 cooperate with the department after the fact and

9 helped in the investigation and so forth; but I
10 think, unfortunately, McLeod hasn't come forward
11 seeking equitable relief with clean hands because
12 you were a participant in the illegal agreements.

13 So -- But it would not be my intent, just
14 to let you know, Mr. Lipschultz -- I want to put an
15 end to this -- that we would -- that I would want to
16 continue an investigation or have some kind of
17 contested case to determine what penalties would be
18 for both Eschelon and McLeod.

19 MR. LIPSCHULTZ: Mr. Chair, Commissioner
20 Reha, that's comforting to hear. And I can tell you
21 that McLeod's top priority is to put this matter to
22 rest. McLeod's a competitive carrier that needs to
23 be focused. It needs to be focused on running its
24 business, trying to compete in an increasingly
25 difficult market. So to the extent you put this to

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1 rest, I've certainly put out there on the table for
2 you to consider McLeod's concern about an otherwise
3 discriminatory remedy; but, again, McLeod's top
4 concern and priority is to put this matter behind
5 it.

6 CHAIR KOPPENDRAYER: So you just want to
7 fall on the ball and not fumble it again. Okay.

8 MR. LIPSCHULTZ: I've just fallen on the
9 ball, and I'm ready to head off into the locker
10 room.

11 COMMISSIONER SCOTT: But, Mr. Chair,
12 before he goes --

13 CHAIR KOPPENDRAYER: That was yours. I'm
14 sorry.

15 COMMISSIONER SCOTT: -- you agree with
16 Mr. Topp that the offsets for the 13 and \$16 should
17 be incorporated into our order?

18 MR. LIPSCHULTZ: Mr. Chair, Commissioner
19 Scott, to the extent carriers were paid for portions
20 of the amount that these \$2, 13, \$16 payments were
21 intended, I think that that's a reasonable,
22 rational, and equitable approach to take. I don't
23 think this commission is looking at equitable
24 remedies as a way to pile on or add additional
25 punishment to Qwest. I think you're looking at it

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1 as a way to give carriers what they otherwise would
2 have gotten.

3 COMMISSIONER SCOTT: Yeah.

4 MR. LIPSCHULTZ: And -- And just taking
5 at face value what Qwest said, to be honest I think
6 it's only fair that amounts received should be
7 deducted from --

8 COMMISSIONER SCOTT: Okay.

9 MR. LIPSCHULTZ: -- the remedies that
10 would be paid.

11 COMMISSIONER SCOTT: Okay.

12 CHAIR KOPPENDRAYER: Mr. Bradley.

13 MR. BRADLEY: I too support the direction

14 in which you are moving. I too represent that my
15 clients were not looking for a windfall as a result
16 of this. To the extent that Qwest has already paid
17 my clients terminating access revenues, those should
18 be offset against the \$2.

19 I would tell you that I know closely that
20 11 of my clients came up with 11 different ways to
21 try to solve this problem; and I think that the
22 correct solution is the \$2, offset by whatever they
23 were actually paid, rather than trying to figure out
24 whether they did it right or didn't do it right.

25 With regard to the 13 and 16, same idea.
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1 I have one client, USLink, who's affected by that.
2 It is my understanding that they did not issue CABS
3 bills because of this problem. And, therefore, I
4 believe that they will be entitled to the full
5 amount.

6 I would suggest -- and I didn't come with
7 prepared language --

8 COMMISSIONER SCOTT: No. But on our
9 break -- on the break --

10 MR. BRADLEY: Yeah.

11 COMMISSIONER SCOTT: -- when these folks
12 are doing their thing, get language for us.

13 MR. BRADLEY: I will try. Here's the
14 concept. The concept is that Qwest has the burden
15 of proof. That's clear under the FCC rules that
16 we're entitled to adopt. And if there's an
17 offsetting reason why we shouldn't, Qwest should
18 have the burden. I would suggest that Qwest should
19 be directed to meet with the affected CLECs and
20 resolve this matter within 30 days and do a
21 compliance filing. That's my suggestion on that
22 point.

23 With regard to the access issue, I have
24 struggled for a month trying to figure out if there
25 was some way -- because I knew that that was

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1 probably the straw that was keeping this thing from
2 getting resolved, and I have not got a solution to
3 the access issue. However, if there is a solution,
4 it may be to limit it to intrastate access. I do
5 believe -- and the reason I've not been able to
6 solve this, originally I was going to try to say,
7 well, maybe only CLECs would get it. But this was a
8 discrimination in access. It is a state tariffed
9 service. It should have been applied equally to
10 everybody, IXCs and CLECs alike, because it's an
11 access service. But you may want to limit it to
12 your intrastate access services.

13 And those are my only comments.

14 COMMISSIONER JOHNSON: Thank you.

15 CHAIR KOPPENDRAYER: Thank you.

16 Mr. Ahlers, are you going to help
17 Mr. Lipschultz into the locker room?

18 MR. CRAIN: Here's the football.

19 MR. AHLERS: Well, I'm not in favor of
20 locker -- sports analogies right now because my team
21 lost last night. But the matters before the
22 commission in the motion I would say that Eschelon
23 has no -- no opposition to any of those positions.

24 CHAIR KOPPENDRAYER: Thank you.
25 Mr. Witt.

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1 MR. WITT: Thank you, Mr. Chairman. Good
2 morning, Members of the Commission. At this point
3 AT&T would respectfully oppose the motion that
4 Commissioner Scott has put forward. There are a
5 number of reasons for AT&T's opposition to that. I
6 guess if I were to summarize it all in one sentence,
7 I would say that if you have to obtain the agreement
8 of the party that was the bad actor in here -- and
9 I'm really talking about more than just Qwest; I'm
10 also talking about McLeod and Eschelon as well, to
11 some extent -- if you have to reach some kind of an
12 agreement with them as to what their punishment will
13 be, then, to a large extent, it does cease to be a
14 punishment.

15 But, more importantly -- And I guess I'm
16 not here to obtain punishment, necessarily. What I
17 am here to do is to try to get the same kind of
18 advantage that Eschelon and McLeod obtained during
19 the course of these -- of these unfiled agreements.
20 And to the extent that that forward-looking relief
21 is being deleted here, that does two things. First
22 of all, it does deny other carriers that same kind
23 of advantage. But, more importantly, at the time
24 that the secret agreements were entered into, there
25 were a lot of people making decisions as to how and

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1 when to enter into the marketplace. And McLeod's
2 decisions and Eschelon's decisions were based on
3 factors that were entirely different than the
4 factors that were available to AT&T, MCI, and Time
5 Warner and other carriers who were at the same time
6 trying to make those same decisions so that a
7 forward-looking type of restitution, it seems to me,
8 is really required here. It's something that is
9 necessary in order to truly make the playing field
10 level because --

11 COMMISSIONER SCOTT: Mr. Witt, let me be
12 clear. I --

13 MR. WITT: Certainly.

14 COMMISSIONER SCOTT: I don't disagree
15 with you. Intuitively there should be forward
16 relief. The failure here is the failure of the
17 record. Because even though two parties here got
18 millions of dollars when these deals were
19 terminated, nobody asked any questions that I can
20 see about why or what it was for or developed any of
21 that for us. And so I got to tell you, I felt very
22 constrained by the record.

23 Remember, I'm the guy who said we should

24 do this forward relief, because it was a five-year
25 term terminated after two years and they got
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1 millions of dollars for those remaining three years.
2 But nobody told us what it was for. And I'm afraid
3 an appellate court is going to look at it, say,
4 Geez, nice idea, good intuition, but no fact. And
5 so don't -- You know, as you complain about deleting
6 the relief, tell me what facts we have that we can
7 base it on, because I didn't see anybody help us out
8 in that regard.

9 MR. WITT: Mr. Chairman --

10 CHAIR KOPPENDRAYER: Mr. Witt.

11 MR. WITT: -- Commissioner Scott, the
12 answer to that is the agreements were, in fact,
13 terminated as the result of a mutual agreement
14 between the parties. And so I think an assumption
15 which the commission made in drafting its original
16 order in this regard is a very sound assumption; and
17 that is that the parties, all of them, gained from
18 the termination of this particular agreement, of
19 these -- of these sets of agreements rather. And so
20 by agreeing to terminate them rather than
21 unilaterally stopping them or having them ordered to
22 be stopped, the parties themselves essentially
23 carried out the full term of that agreement not
24 necessarily in time, but in dollars.

25 COMMISSIONER JOHNSON: But the parties
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1 disagree with that.

2 MR. WITT: Well, now they do. And it's
3 very convenient -- Excuse me. Mr. Chairman,
4 Commissioner Johnson, it's very convenient for them
5 to disagree at this point; but the facts do speak
6 for themselves, and the facts are on the record that
7 they did, in fact, terminate these contracts. And
8 so the deals here were, in fact, carried forward to
9 the agreement of all parties. And certainly the
10 circumstances changed for those parties, but that
11 doesn't really say anything about the discrimination
12 that occurred. It says more about the fact that the
13 lights were turned on and all of a sudden everybody
14 had to scurry out of the kitchen.

15 So, I mean, that -- From my standpoint it
16 seems to me -- And, by the way, our -- our response
17 to Qwest's motion for reconsideration I believe says
18 -- says a great deal to this commission, and that is
19 you have a strong order. The order that you have
20 already written has a good foundation for it in the
21 record. And we believe, from AT&T's standpoint,
22 that it should be defended and may be defended very
23 successfully by this commission.

24 CHAIR KOPPENDRAYER: Well, to that --

25 MR. WITT: So we believe we're -- Excuse

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1 me. We believe that you're -- you're in a very
2 strong position and that this would -- this deletion

3 of going-forward relief would -- is a reaction to
4 things that probably needn't be reacted to.
5 CHAIR KOPPENDRAYER: Well, Mr. Witt, to
6 -- Let me -- Let me -- I think you're falling into
7 the same trap that I just explained to Qwest.
8 You're falling into looking at the minutia of the
9 legality of it. Stop for a minute and think of it
10 in a business way. You just seen the commission
11 vote 4/0 to reconsider based on the recommendation
12 that Commissioner Scott just put out there. Now
13 you're arguing to put that recommendation back in.
14 You're not saying, Look, if Qwest agrees, there's --
15 there's no appeal; you get something.
16 If we go back to square one, which you're
17 suggesting, they appeal and they win, you get
18 nothing from a business perspective. And even now
19 if we -- if we -- if the commission continues its
20 thinking here and doesn't change from the last
21 motion, that portion which you're arguing for is
22 out, you still get nothing. I'm wondering --
23 sitting here wondering why you don't take what
24 you're offered rather than argue for the possibility
25 of getting nothing.

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1 MR. WITT: Mr. Chairman -- Mr. Chairman,
2 Members of the Commission, the fact of the matter
3 is --

4 COMMISSIONER SCOTT: I don't think your
5 mike's on, Gary.

6 MR. WITT: Yeah, I think I am on. I'm
7 not speaking close enough to the microphone. I
8 apologize. In that regard I'm -- I was merely
9 pointing out that the commission does have a very
10 strong position that it is -- that it is coming
11 from. I was certainly not arguing in favor of
12 strictly going back to that -- that initial order.
13 So, in other words, I don't --

14 CHAIR KOPPENDRAYER: I misunderstood.

15 MR. WITT: -- want you to --

16 CHAIR KOPPENDRAYER: Okay.

17 MR. WITT: I don't want you to --

18 COMMISSIONER JOHNSON: I did too then.

19 So what do you want?

20 MR. WITT: I don't want you to think that
21 we're certainly not -- not here to try to arrive at
22 some kind of a -- of a conclusion, because that's
23 exactly why we're here is to arrive at a conclusion.

24 Let me go on and simply point out one
25 additional thing -- actually, two additional things.

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1 Number 1, if the commission is going to go with the
2 16-month period of time on the Eschelon agreement,
3 let me remind you that you do have an alternative to
4 that; and that is the McLeod agreement, which
5 clearly was in place for 694 days. And that by
6 itself would increase the amount of restitution and
7 would go further to leveling the playing field.

8 In other words, you do have a record that
9 indicates that the McLeod agreement was in force and
10 effect, if my notes are correct, from October 26th
11 of the year 2000 through September 20th of the year
12 2002 and that -- according to my notes, that means
13 694 days or almost two -- two full years. So there
14 is -- There is evidence on the record that would
15 support that.

16 But now, from AT&T's perspective, I guess
17 it -- unless -- Well, you talk about going backward
18 for restitution, and you also talk about going
19 forward for restitution. And from AT&T's standpoint
20 it's very important that both of these be considered
21 for the reasons that I mentioned earlier. Primarily
22 because the decisions that were being made -- at the
23 time these secret agreements were in place these
24 decisions were being made by a whole bunch of
25 people, not just by Eschelon and McLeod. And to go

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1 just backwards doesn't really provide full
2 restitution.

3 But the second point that I wanted to
4 raise here is, with respect to Section 271 and
5 Qwest's application, without appropriate restitution
6 it seems very difficult, in my mind, to justify
7 approval of a 271 application on a going-forward
8 basis. In other words, what's happening here is
9 Qwest is really able to have its cake and eat it
10 too. It's been able to impose its will upon
11 different new entrants by entering into these
12 agreements with some but not others. And now by
13 reaching an agreement instead of simply imposing a
14 penalty, it seems to me that that's -- that's giving
15 Qwest everything that it really has asked for,
16 especially when it comes to the 271 application.

17 CHAIR KOPPENDRAYER: But --

18 MR. WITT: So my concern --

19 CHAIR KOPPENDRAYER: -- on that point,
20 Mr. Witt --

21 MR. WITT: Certainly.

22 CHAIR KOPPENDRAYER: -- they're not -- I
23 didn't hear them loving the financial -- the fine,
24 the monetary fine. And that's not an agreement;
25 that's imposed by the commission.

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1 MR. WITT: Mr. Chairman, Members of the
2 Commission, that's true. However, we have yet to
3 hear whether they will agree to it. And certainly
4 it's -- that seems to be what the commission is --
5 is striving to obtain is their -- is their
6 agreement. And I guess it goes back to what I said
7 earlier; if you try to get the agreement of the bad
8 actor on the penalty for the bad actions, then do
9 they -- do those -- does the penalty still remain a
10 penalty? I guess that's my -- that's my question.

11 CHAIR KOPPENDRAYER: And irregardless of
12 the amount, it does you no good; it puts money in

13 the state fund.

14 MR. WITT: Mr. Chairman, that's true.

15 COMMISSIONER REHA: Mr. Chair, I just --

16 CHAIR KOPPENDRAYER: Commissioner Reha.

17 COMMISSIONER REHA: -- have a comment.

18 In my view if we went with the prospective or
19 forward-looking penalty that we looked at, we would
20 have to have one or possibly two contested cases to
21 look into the Eschelon and McLeod issues with
22 respect to the termination liability agreements that
23 they had and what that actually constituted.
24 Because what we're trying to do is level the playing
25 field and provide to CLECs what they missed out on.

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1 And we don't have a record, as Commissioner Scott
2 indicates, sufficient to support the going-forward
3 restitution. It appears as if it's more based on
4 our -- our will than based on a reasoned decision.

5 And so in my view we're looking at two
6 other contested cases and developing significant
7 records on that. And I guess I'm not prepared to do
8 that. And I don't think we need to do that because
9 we're looking at this case based on the record that
10 we have before it, and we want to fashion a remedy
11 that's reasoned.

12 MR. WITT: Mr. Chairman, Commissioner
13 Reha, I agree with you that you have a record that
14 is -- Well, excuse me. Perhaps I disagree with you.
15 Because I believe that you do have a record that is
16 sufficient to go on a prospective basis with the
17 reductions in -- specific to access charges. I
18 mean, let's face it; that's what we're talking about
19 here. And the reason that I say that is you have an
20 admission against interest by Qwest on two separate
21 occasions that they can reduce access charges by
22 10 percent for these two particular parties.

23 And so to the extent that you're going
24 beyond 10 percent, then I would agree with you that
25 you need to have additional data, additional

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1 evidence, or what else have you in a contested case.
2 But the fact of the matter is you've had a contested
3 case here; and Qwest's own admission against
4 interest is found in the secret agreements, the
5 unfiled agreements, to the effect that they are able
6 to reduce access charges by 10 percent for these
7 particular parties.

8 So to that effect I don't believe that
9 you really have a problem from an evidentiary
10 standpoint. I believe that you have entirely
11 adequate evidence that Qwest can and should reduce
12 its access charges by a minimum of 10 percent. And,
13 in fact, if you go forward -- I think you should go
14 forward with a contested case with regard to further
15 access charge reductions beyond that. But at least
16 from a standpoint of the 10 percent, I believe
17 there's adequate evidence on the record to support

18 that.

19 COMMISSIONER JOHNSON: But that case is
20 pending too.

21 MR. WITT: Well, Mr. Chairman,
22 Commissioner Johnson, I believe that there -- there
23 may be other cases. And I'm not familiar with all
24 of the cases that are pending; but certainly with
25 regard to a 10 percent discount on access charges, I

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1 believe the record that you have in front of you
2 here today in this case definitely supports a
3 going-forward restitution decision in that respect.

4 CHAIR KOPPENDRAYER: Mr. Alpert.
5 Mr. Doyle.

6 MR. DOYLE: Thank you, Mr. Chair. The
7 department has no objection to the manner in which
8 the commission is proposing to proceed. I do have a
9 couple of comments with respect to cash or credit.
10 If it's -- If it's credit it requires those carriers
11 to purchase the services of Qwest. If it's cash
12 they can purchase the services of Qwest or somebody
13 else. And so there is an advantage to giving cash.
14 The commission can go either way. That's -- That's
15 clear.

16 With respect to access charges, I think
17 the problem with access charges is that we have
18 these companies that did receive the credit that
19 included access charges for Minnesota and really
20 total company access charges, whether it was in
21 other states and intrastate and so forth. I think
22 the problem is is that you have some companies that
23 have -- the amount that they pay to Qwest in access
24 may be 10 percent of their business and 80 -- or
25 90 percent is their local business. And then you

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1 have other companies that have 90 percent or more of
2 their business is the access that they're paying to
3 Qwest. And so I -- What I'm seeing, you know, the
4 problem is or the inequity of it is is that
5 disproportionate relationship.

6 And so in the last 15 minutes -- so take
7 it for what you will -- one thing that the
8 commission could do is to take a look at the access
9 credit that a company received as a percentage of
10 the total 251 in access credit -- excuse me, I'm
11 using the word credit and I shouldn't -- the access
12 -- the access -- I'm trying to get a proportionate
13 relationship --

14 CHAIR KOPPENDRAYER: Intrastate access?

15 COMMISSIONER JOHNSON: No, he wants to --

16 MR. DOYLE: I was only thinking
17 intrastate, but --

18 COMMISSIONER JOHNSON: Amount paid or
19 something.

20 MR. DOYLE: But to develop some sort of
21 proportionate relationship so that if 10 percent of
22 your business was -- was access, then you would have

23 that. And I could work on that -- that equation a
24 little bit more and develop something that maybe
25 makes sense along those lines. But --

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1 COMMISSIONER REHA: Sounds really
2 difficult to monitor and enforce if we did something
3 like that, wouldn't it?

4 MR. DOYLE: Well, I think this is just
5 going back so we know that -- we'd know the
6 payments -- they know the payments that were made to
7 Qwest; and they know the portion that was paid in
8 access; and they know the portion that was paid in
9 nonaccess, the 251 stuff. And I think you can look
10 at that and give that same relationship somehow --
11 if McLeod and Eschelon, if that was 20 percent of
12 what they paid to Qwest, maybe it's 20 percent of
13 the amount. You know, I think this can be done.
14 You know, I don't have it right now.

15 CHAIR KOPPENDRAYER: And your goal is to
16 net it out for the -- to come to the cash settlement
17 refund?

18 MR. DOYLE: No. This would be for the
19 purpose of the -- I think that -- I'm not quite
20 sure. I'm getting a little bit confused about the
21 \$2, \$13, \$16 --

22 COMMISSIONER REHA: Yeah.

23 MR. DOYLE: -- as being the cash amounts
24 versus the 10 percent, whether that was also cash or
25 credit. But over the break we could work on

0050

1 something that looks at a proportionate
2 relationship, if that would be helpful. I think the
3 commission's within -- you know, clearly within its
4 right to order something that includes access. To
5 the extent that there's an argument that this is not
6 a 251 service, that 10 percent discount also wasn't
7 tariffed, you know, which, you know, as far as I
8 know access services are tariffed. If you want us
9 to charge something different than that, you know,
10 you need to file a tariff.

11 And so, you know, I do think it falls
12 within, you know, the commission's power. Take it
13 from a nonlawyer. But -- But over the break, you
14 know, we can -- we can see if something makes sense
15 in terms of that proportionate relationship in terms
16 of the access. That would reduce the amount of
17 credit that -- that Qwest is giving to some
18 companies, particularly the companies that are
19 primarily in the long-distance business. But...

20 CHAIR KOPPENDRAYER: Thank you.

21 Mr. Wilmes.

22 MR. WILMES: Thank you. Commissioners, I
23 would note that Qwest entered the penalty phase of
24 this proceeding proposing an 18-month
25 backward-looking 10 percent credit on Section 251

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1 and 252 services. I don't think the commission

2 should feel obligated to come in at a lower number
3 than even Qwest had proposed as an appropriate time
4 frame for the backward-looking credit. I don't
5 think any appeals judge would find that the
6 commission acted arbitrarily or capriciously by
7 selecting, for example, an 18-month period that
8 Qwest itself had proposed.

9 CHAIR KOPPENDRAYER: That time period was
10 set forth in Commissioner Scott's recommendation
11 just now.

12 MR. WILMES: Right. Commissioner Scott's
13 sort of tentative proposal today was for
14 approximately a 16-month backward-looking credit,
15 while Qwest had proposed 18 to the commission.
16 Obviously we would prefer 18 over 16.

17 I am somewhat perplexed by the claims
18 made in connection with this reconsideration motion
19 that the \$31 million that Eschelon and McLeod
20 received were not, in fact, early termination
21 payments or prepayments of the discount. Qwest has
22 been telling this PUC, PUCs across its region, and
23 the FCC that it has a great OSS, or operational
24 support system, and that it has a great billing
25 system. And today, as I understand it, Qwest is

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1 saying our OSS, our service, our billing was so bad
2 we had to give \$31 million in credits to McLeod and
3 Eschelon for crummy service. My company did not get
4 31 million in credits for crummy service. So I am
5 somewhat skeptical of current attempts to
6 characterize these payments.

7 As a business person I find it difficult
8 to believe that a company like Eschelon or McLeod
9 would walk away from a multiyear 10 percent discount
10 without receiving some significant compensation for
11 giving up the rights to that discount. I think the
12 commission is entitled to make inferences about the
13 conduct of the parties here; and I think an
14 inference that the termination payments were, in
15 fact, an early termination penalty or a prepayment
16 of the discount is a logical inference. I don't
17 think the commission is bound to accept
18 characterizations made on reconsideration as to the
19 allocation of these payments.

20 At least I think the commission could
21 stick with its 24-month backward-looking time
22 period. This would be somewhat longer than Qwest
23 had originally proposed but would, I think, be
24 within the range of your discretion, accepting
25 Qwest's 18-month baseline as a -- as a fair

0053

1 assessment of the time period and adjusting it
2 upward only very modestly to account for the
3 termination payments issue.

4 With respect to paragraphs 3A to 3C of
5 the order, the \$2, \$13, \$16 credits, we would
6 request that the commission eliminate any

7 requirement that a CLEC prove that the daily usage
8 files received from Qwest were inaccurate. I find
9 it hard to believe that they were sending me
10 accurate daily usage files but sending bad ones to
11 Eschelon. I don't have a problem with allowing an
12 offset for access that was actually collected by the
13 CLEC, as Mr. Topp had proposed, as a credit to the
14 13 or \$16 amount.

15 For a CLEC like New Access, the -- just
16 so the commission knows generally, we have no
17 interest in the -- whether the 10 percent discount
18 applies to access or not. We are a reseller of
19 long-distance services, and I don't know that our
20 carriers would pass through any discount if they get
21 any to us anyway.

22 CHAIR KOPPENDRAYER: Thank you.
23 Questions of Mr. Wilmes?

24 Ms. Lehr.

25 MS. LEHR: Chair Koppendraye,

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1 Commissioners, I just -- I guess first of all I
2 wanted to comment about -- excuse me, about
3 Mr. Doyle's suggestion. I don't know how that could
4 be implemented. I don't -- I'm not sure if we even
5 keep, you know, bills that would accommodate, you
6 know, doing that. It just seems overly com -- you
7 know, complicated.

8 And the other thing I wanted to --

9 CHAIR KOPPENDRAYER: Netting?

10 MS. LEHR: Yeah. I just -- I mean, I --
11 Frankly, I just don't understand how that would be
12 done. And I think it would be a lot cleaner just to
13 deal with it. And, frankly, that's -- I mean,
14 McLeod and Eschelon weren't limited in that way.
15 And I just think that would be incredibly confusing,
16 and I don't even know if we would be able to figure
17 out what the number is.

18 And the other -- One of the other issues
19 I wanted to raise is it's my understanding that
20 Commissioner Scott's proposal was the restitution
21 plus the \$26 million fine. And I don't know if the
22 commission might want to consider -- you know, if
23 you have a concern or if Qwest has concern about the
24 dollar amounts, you know, perhaps you could reduce
25 the fine or stay part of the fine.

0055

1 And the other thing is I'd like an
2 opportunity after the break to be able to comment on
3 Mr. Bradley's suggestion about the intrastate,
4 limiting it to intrastate. I just need to make some
5 phone calls and ask some questions to my boss.

6 CHAIR KOPPENDRAYER: Well, that's --
7 that's fine. But I think it's important for Qwest
8 to -- to have a basic understanding of what they're
9 going to ask for and what they're going to come back
10 and reply to.

11 So I guess for the commission now so that

12 we don't have a disagreement when you come back,
13 what is it you understand that you're going to get
14 approval for, having heard --
15 COMMISSIONER JOHNSON: You have one more
16 party.
17 CHAIR KOPPENDRAYER: -- the concerns of
18 the other parties?
19 COMMISSIONER JOHNSON: Leroy, you have
20 one more party.
21 CHAIR KOPPENDRAYER: I'm sorry.
22 MS. LEHR: I'm sorry, could I just
23 ask a --
24 CHAIR KOPPENDRAYER: I thought the two of
25 you were conferring and were --

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1 MS. LEHR: No.
2 CHAIR KOPPENDRAYER: -- representing the
3 same position.
4 MS. LEHR: No. My understanding of what
5 the contract said and that the ALJ found on the
6 record was that it applied to all access charges.
7 If there's going to be a suggestion of something
8 less than that, you know, I mean, it comes down to a
9 bird in the hand versus an appeal. And I would -- I
10 need to speak with my own client about what the
11 impact is or what our position would be. I would be
12 happy to let Qwest know on the break what our
13 position would be when we come back into the room so
14 that they can consider that in making their own
15 decision. It -- It will not take us as long as they
16 will have, you know, to come back with a response.
17 CHAIR KOPPENDRAYER: Okay. Ms. Liethen.
18 MS. LIETHEN: Chair Koppendrayer and
19 Commissioners, I can tell you now that my client
20 generally supports the position of the commission.
21 However, I can tell you that we will not support a
22 proposal to limit the discount only to intrastate
23 services. Simply put, Eschelon received the
24 discount on interstate services, and it's only
25 equitable that it's also applied.

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1 CHAIR KOPPENDRAYER: And your client is
2 who again?
3 MS. LIETHEN: Time Warner Telecom.
4 CHAIR KOPPENDRAYER: Time Warner.
5 COMMISSIONER SCOTT: Mr. Chair.
6 CHAIR KOPPENDRAYER: Commissioner Scott.
7 COMMISSIONER SCOTT: I'd like to ask the
8 department a question. If -- If Qwest did a deal
9 with a Minnesota CLEC that it was going to charge
10 zero for interstate access but charged all the other
11 CLECs the full tariffed rate, would this commission
12 have jurisdiction to determine if that were an
13 anticompetitive or discriminatory act?
14 MR. ALPERT: I don't know the answer to
15 that ques -- Chair Koppendrayer, Commissioner Scott,
16 I don't know that -- the answer to that question off

17 the top of my head. That's not the case here
18 though. I understand that you want to try to figure
19 out the parameters of what the commission's
20 authority might be regarding the access charges, but
21 I can't give you a definitive answer on your
22 hypothetical without doing some further research.
23 I -- We have our legal opinion as to whether you
24 have to order the 10 percent on the access charges
25 in this case under this record.

0058

1 COMMISSIONER SCOTT: Okay. Let me modify
2 it a little bit. If Qwest decided to offer one CLEC
3 in this state an untariffed access -- interstate
4 access rate, would this commission have
5 jurisdiction? Does it change anything, the fact
6 that it's untariffed?

7 CHAIR KOPPENDRAYER: Like an EAS.

8 COMMISSIONER SCOTT: Still the same
9 answer; we'd have to look at it?

10 CHAIR KOPPENDRAYER: It's like an EAS,
11 isn't it?

12 MR. DOYLE: Well, Mr. Chair, Commissioner
13 Scott, I think anytime that you're applying a
14 discount to services in a bundle, there's an
15 arbitrariness about it all. And -- And, you know,
16 it's not -- If you have two services and you're
17 getting 10 percent off of those two services, is
18 that different than getting 20 percent off of one of
19 the services? And the answer is probably, you know,
20 the impact is the same. And so the system could be
21 manipulated --

22 COMMISSIONER SCOTT: Yeah.

23 MR. DOYLE: -- you know, in that sort --

24 COMMISSIONER SCOTT: And do you --

25 MR. DOYLE: -- of a way.

0059

1 COMMISSIONER SCOTT: -- have authority to
2 look at that manipulation of the system or not?

3 MR. ALPERT: Well, 237.74 deals with part
4 of the issue. 237.081 deals with part of the issue.
5 Manipulation of the system; you have authority to
6 take a look at whether rates are reasonable, whether
7 there's unreasonable discrimination of rates. You
8 have limited authority over interstate services
9 versus intrastate services. When the two are
10 combined, you have more authority. In this
11 particular case you have more authority because the
12 contracts themselves were interconnection
13 agreements. As part of those interconnection
14 agreements, they gave 10 percent discounts on all
15 services in and out of Qwest's territory for any and
16 all services, including access charges.

17 As part of those agreements there were
18 some take or pay amounts, minimum amounts that had
19 had to be met by these companies. Payments for
20 access charges went towards those minimum amounts.
21 Without those minimum amounts, theoretically no

22 company would have been entitled to any discount on
23 any of the 251, 252 services. Whether you want to
24 call it manipulation or not, they were definitely
25 intertwined and tied together as part of this

0060

1 interconnection agreement and series of
2 interconnection agreements by and between Qwest and
3 these other companies.

4 So legally I believe the commission is on
5 sound ground, legal ground to order the 10 percent
6 discount for access charges. I -- I can't --

7 COMMISSIONER SCOTT: Okay.

8 MR. ALPERT: I apologize. I cannot --

9 COMMISSIONER SCOTT: No. Your answer is
10 good.

11 MR. ALPERT: -- give you a definitive
12 answer on your hypothetical.

13 COMMISSIONER SCOTT: You're right. I was
14 trying to take it to the -- But it's the combining
15 that you think makes the difference. Okay.

16 CHAIR KOPPENDRAYER: Mr. Topp, did you
17 have a question or comment?

18 MR. TOPP: I guess on that particular
19 point we do have a recent federal district court
20 decision that makes it pretty clear the limits of
21 this commission's authority over interstate
22 services, and I think the commission would need to
23 take that --

24 CHAIR KOPPENDRAYER: Interstate services.

25 MR. TOPP: Correct.

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1 CHAIR KOPPENDRAYER: Well, Mr. Topp --

2 MS. LEHR: Can we get the cite?

3 CHAIR KOPPENDRAYER: Pardon?

4 MS. LEHR: Can we get the cite for the
5 case that they're referencing?

6 CHAIR KOPPENDRAYER: The case you
7 referenced.

8 MR. TOPP: Special access reporting on
9 the wholesale service quality. I don't have the
10 cite. It was the district court's decision
11 reviewing the special access reporting decision that
12 you'd be familiar with.

13 MR. ALPERT: Which state was that, was
14 that reported, Jason?

15 MS. LEHR: Yeah. And that's still on
16 appeal.

17 MR. TOPP: Yeah, it's on appeal. It's a
18 district court decision. I don't know if -- whether
19 it was reported or not.

20 MR. ALPERT: Which state? Was it
21 reported or unreported -- unpublished?

22 MR. TOPP: I don't know the answer.

23 CHAIR KOPPENDRAYER: Whatever that all
24 means.

25 COMMISSIONER JOHNSON: Not much.

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1 CHAIR KOPPENDRAYER: An unpublished
2 report.
3 Mr. Witt.
4 MR. WITT: If I may, Mr. Chairman, just
5 an additional comment. And that is it seems to me
6 that if you create a -- or try to create a different
7 rate for different companies, you're adding
8 discrimination on top of discrimination. And so the
9 point that I would essentially like to make is that
10 you need -- we would urge you to create a rate for
11 all carriers that is the same. And that's -- That's
12 the ultimate goal here. Thank you.
13 CHAIR KOPPENDRAYER: Thank you.
14 MR. WITT: The other thing is I'm kind of
15 confused at this point. Are we -- Are we going to
16 go forward also with further discussion on 271
17 issues? I'm assuming that that's correct.
18 CHAIR KOPPENDRAYER: You mean the SGAT
19 and the MPAP issues?
20 MR. WITT: Correct, yes. Because I --
21 CHAIR KOPPENDRAYER: Of course.
22 MR. WITT: -- from AT&T's standpoint the
23 secret agreements definitely impact 271, and we
24 don't -- I don't believe I've had much of an
25 opportunity to discuss that at this point.

0063

1 COMMISSIONER REHA: We haven't talked
2 about that yet. We're going forward with that.
3 CHAIR KOPPENDRAYER: Yeah.
4 MR. WITT: Okay. Thank you.
5 CHAIR KOPPENDRAYER: However, depending
6 on Qwest's position, that has a bearing on what
7 happens going forward on a lot of the questions that
8 we had in the next dockets also.
9 So, Mr. Topp, because -- personally I
10 think you have an opportunity to make a significant
11 difference and a significant statement that I want
12 you to have the time to be comfortable with that. I
13 think we should take a break until 11:30. Is
14 that -- and give you plenty of time to convince the
15 people that are not in this room that you folks are
16 thinking clearly and want to do in the best interest
17 of Minnesota what the commission has recommended.
18 MR. TOPP: Well, this -- this will be
19 very significant consideration for the company.
20 CHAIR KOPPENDRAYER: I understand.
21 MR. TOPP: My preference would be is if
22 we could combine this into an early lunch so that we
23 could have some more time --
24 COMMISSIONER JOHNSON: Sure.
25 MR. TOPP: -- to --

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1 CHAIR KOPPENDRAYER: I don't have a
2 problem with that.
3 COMMISSIONER JOHNSON: Let's do it.
4 CHAIR KOPPENDRAYER: Because the other
5 issues that are left before us, if -- especially if

6 you come back with what we hope you do, can go
7 rather quickly. So we'll come back at 1:00.
8 COMMISSIONER JOHNSON: Sure.
9 MR. TOPP: Thank you.
10 CHAIR KOPPENDRAYER: Thank you. We're in
11 recess.
12 (Whereupon, a recess was held from
13 10:53 a.m. to 1:00 p.m.)
14 CHAIR KOPPENDRAYER: Well, we'll bring
15 the meeting back to order. We were waiting for
16 everyone to do whatever correspondence they felt
17 necessary and along with talking to each other. And
18 so we're at a point where whoever is comfortable
19 with responding first, the floor is open.
20 Mr. Topp.
21 MR. TOPP: Thank you, Chair Koppendrayer.
22 It's been a very different day than I expected
23 coming in. I was sort of girded for battle. And
24 the issue before this commission I expected would
25 be, you know, whether the order that came out the
0065
1 last time around was going to stand or whether that
2 was going to be challenged.
3 We have had a short time period since
4 this morning to deal with a significant change in
5 direction suggested by the commission, and we
6 sincerely appreciate the effort and listening to our
7 concerns and trying to come up with an order that is
8 more defensible on a legal basis, more consistent
9 with the record, and more appropriate in this
10 proceeding.
11 We have taken the suggestion back, and
12 there are a number -- And while I regret to inform
13 the commission that every aspect of what the
14 commission is suggesting we can't sit here and agree
15 to, we do think that there are very significant
16 portions of the order that we can agree to
17 immediately, would agree to implement immediately,
18 but would need to reserve our rights to challenge
19 certain other pieces.
20 Let me go through those in detail. First
21 of all, with respect to the \$2 per access line
22 purchase, as long as there is the offset that was
23 discussed earlier today, we would agree to that and
24 agree to implement that immediately.
25 With respect to the \$13 credit that was
0066
1 discussed earlier today, we would agree to that with
2 the offset that was discussed earlier today. And in
3 paragraph 3C it says for each month. And just for
4 clarity's sake, Eschelon IV was in place from
5 November through June -- November '00 through June
6 of '01. We would agree to do that and agree to
7 implement that immediately.
8 With respect to paragraph 3D, which is
9 the July '01 -- which is the \$16 credit, for
10 clarity's sake would point out that that was in

11 effect from July 1st through the end of February --
12 July 1st, '01, through the end of February '02. We
13 would agree to implement that, the \$16 minus the
14 offset of amounts that CLECs billed and provided
15 that they did not receive -- or using the language
16 in the order.

17 With respect to the 10 percent discount,
18 we would agree to implement immediately the
19 10 percent discount on 251 services. With respect
20 to access services, we think that we have a
21 significant legal challenge. This is a very
22 expensive proposition for us, particularly if one
23 assumes that other states would issue the same type
24 of order that the state of Minnesota issues in this
25 case. And we would be willing to implement the --

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1 the order with respect to the 251, 252 services. To
2 the extent the commission orders it with respect to
3 access, we would preserve our rights to challenge
4 that piece of the order.

5 Finally, with respect to the fine, we
6 would agree -- we think that the entire fine amount
7 should be stayed. We would not appeal, however, in
8 the event that the commission decided to issue
9 immediately a fine amount of up to \$5 million.

10 We think that, you know, what we are
11 attempting to do here is significantly narrow the
12 issues of the dispute on appeal, get relief to CLECs
13 immediately that we can agree on, and it's very
14 significant and very costly relief to our company,
15 and -- and provide a basis on which to move forward.
16 We regret that we can't close out all of the issues
17 before the commission, but we believe this is a very
18 significant step and hope the commission views it as
19 well.

20 CHAIR KOPPENDRAYER: Questions of
21 Mr. Topp?

22 Other responses?

23 Mr. Bradley.

24 MR. BRADLEY: Mr. Topp, I earlier shared
25 with you a proposed draft language dealing with the

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1 \$2 and the offset and the 13 and \$16 and the offset.
2 Did you have a chance to look at that language?

3 MR. TOPP: Yeah. To be honest we have
4 been scrambling. So getting to the point of
5 figuring out language I'm not at that point.

6 MR. BRADLEY: I have, as Commissioner
7 Scott had proposed, attempted to draft language
8 which I will give to your staff. What I wrote is,
9 The \$2 payment shall be offset by the amounts billed
10 by the affected CLECs for the terminating access
11 services for which the payment was intended to
12 apply. The 13 and \$16 payment shall be offset by
13 the amounts billed by the affected CLECs for the
14 originating access services for which the
15 payments -- payment was intended to apply. Qwest

16 shall have the burden of proof with respect to the
17 appropriateness of any offset and shall make a
18 compliance filing within 60 days.

19 CHAIR KOPPENDRAYER: Mr. Crain.

20 MR. CRAIN: The -- Listening to the
21 language -- I didn't have a chance to completely
22 review it and understand it, but I do have concerns
23 with the word originating in relation to the 13 and
24 \$16 payments. In terms of billing using DUF
25 records, both originating and terminating access

0069

1 calls are used -- CLECs use DUF for both originating
2 and terminating access.

3 MR. BRADLEY: That's good direction.

4 CHAIR KOPPENDRAYER: Mr. Topp, maybe the
5 others understood and followed what you were saying,
6 but let me take -- see if you can clarify for me.
7 As it pertains to 252 access, 252 access, the
8 10 percent discount, item number 4, would be imposed
9 on order of this commission. You, instead of
10 agreeing to that without appeal, are saying, Look,
11 we believe that -- or we want to reserve the right
12 to appeal that piece, for whatever reasons and on
13 whatever grounds you would want to appeal it. Our
14 position would be that it is a penalty, not to set a
15 precedent for pricing in other states. And if
16 you -- if you lost that appeal, of course, then you
17 would be under the provisions of this order.

18 MR. TOPP: I think I'm following. First
19 of all, I think it would be 3A, because 4 is the
20 prospective as opposed to the retroactive piece of
21 the order. So I think we would be talking about 3A.
22 I think 4 would be gone. But what -- What we are
23 proposing is that we would go ahead and implement it
24 with respect to 251 services. With respect to
25 access services we would preserve our appeal rights.

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1 And then, you know, however that turned out on
2 appeal, we would comply with that decision
3 obviously.

4 CHAIR KOPPENDRAYER: Yeah. And I -- And
5 I don't have a lot of problem with -- with not
6 taking away your right to appeal. But since you've
7 come back with something different than what was
8 proposed when we left here, you -- one of your
9 proposals was that the fine be stayed but you would
10 not appeal a \$5 million fine.

11 The -- Let me ask you this: I have no
12 idea nor any way of knowing, unless we put it out
13 and you responded, how much -- in looking back and
14 allowing this time for opt in, how much of that
15 would be credit and how much of that would be cash.
16 I don't know. You probably have a number in your
17 head or you've probably run some numbers to try to
18 come to that. But if you haven't I guess then
19 neither one of us know.

20 And this isn't necessarily shared by the

21 other commissioners; but my point in all this was,
22 for whatever it's worth, that the whole point of
23 this effort under the telecommunications act was to
24 get and provide for competition and allow for CLECs
25 to get into the market where the large incumbents

0071

1 had a monopoly. And then -- And along the way we
2 ended up with whatever agreements are made between
3 you, the monopoly, and any other CLEC, there was a
4 provision that any other CLEC could pick and choose
5 and opt in. That's fine. So if Eschelon and McLeod
6 and yourself had acted the way according to the law
7 and the rules that we have here, those provisions
8 that you agreed to with them would have been filed
9 and any other company could have opted in. In so
10 doing they would have opted in to compete for
11 customers in your market, and the option would not
12 have been there to take, say, you, McLeod, agreed
13 with Qwest that -- that we can do X. So another
14 company can't say, Well, I want to do that with
15 Sprint because this agreement was over here with
16 Qwest. The opt in was that anybody had the right to
17 opt into Qwest's market using that provision.

18 What we did in the order, which has
19 bugged me ever since, but maybe -- I don't know why,
20 but it does -- is that we said, Look, you can -- you
21 can do this now in this order; you can opt in, and
22 you can have these ben -- these particular
23 provisions in competing for Qwest customers; but
24 then we said you could also -- if you feel you were
25 harmed to the degree that you don't opt in, you can

0072

1 get cash.

2 Now, I don't have a problem with Qwest
3 having to pay the cash. What I have a problem with
4 is the cash flows to another company and no customer
5 benefits because they don't have to compete. They
6 can -- A sole proprietorship or an investor-owned
7 company can say, Thank you very much for the cash;
8 and, thank you, Commission, for getting Qwest to
9 give us the cash; put it in their pocket; it goes to
10 their bottom line; competition's not enhanced.

11 That's why I wanted to say, look, you
12 either opt in or you don't get anything. Because
13 had this been done legal and aboveboard, that's all
14 that would have been there is an opt in to Qwest's
15 market.

16 Therefore, since you've come back with a
17 counteroffer, my thinking is, look, we're going to
18 have them opt in. There's no cash. But then you
19 benefit too because then they have to compete with
20 you, but the fine is bigger. Because I want
21 competition. I don't necessarily want a bigger fine
22 or a lot of money to go to the bottom line. But I
23 want the result of this penalty to be the result
24 that we would have had had this been done legally,
25 not that we just take money from somebody and put it

0073

1 in somebody else's pocket. That's not where we
2 wanted to be. That's not the whole goal. The
3 result is competition. So the competitors who
4 are -- feel that they were left out, and they were,
5 now they're -- now they have the opportunity to get
6 in. They don't get cash in their pocket or their
7 owner's pocket or whoever without competing.

8 So if I had some idea of the trade-off in
9 money, I would have some idea on where to end up
10 with the penalty. Because if the opt in amounted to
11 \$5 million or \$10 million benefit to Qwest because
12 you would then be doing business with them but they
13 would be able to compete, then those same terms
14 would go to the bottom line on the penalty.

15 Do you follow me? I'm -- I'm with you on
16 the settlement as you propose it. I'm proposing the
17 same penalty, but the result is a little different.

18 MR. TOPP: I must admit I'm a little
19 confused. The --

20 CHAIR KOPPENDRAYER: Well, if you don't
21 have to pay Ms. Lehr's company cash --

22 MR. TOPP: Oh, credit versus cash?

23 CHAIR KOPPENDRAYER: Yes.

24 MR. TOPP: What's the value to us?

25 CHAIR KOPPENDRAYER: If you don't have to

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1 pay her cash, you only give her credit, so she takes
2 that credit and opts in, that's not as expensive to
3 you as cash. I don't see that as expensive to you
4 as cash.

5 MR. TOPP: That's probably true.

6 CHAIR KOPPENDRAYER: And that's -- that's
7 the question here on the commission. That
8 difference should go -- be added to the 5 million.
9 So you come out with the same penalty, but
10 competition is enhanced.

11 COMMISSIONER SCOTT: Just to be clear, I
12 don't buy into this deal. So, I mean, we can talk
13 about it all we want, but this is not the proper
14 context to be negotiating the outcome.

15 COMMISSIONER JOHNSON: I don't either.

16 MR. TOPP: We can't -- We don't know the
17 calculation as to the difference between the two.
18 You know, our proposal is we'd be willing to do
19 either cash or credit. If -- And so I apologize,
20 but I can't give you a figure as to what -- what
21 specifically that would mean to us.

22 COMMISSIONER JOHNSON: Well, Mr. Chair, I
23 concur, I mean, with Commissioner Scott. I don't
24 either. I was hopeful that they would take this
25 back, become the new Qwest, and say they've changed.

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1 And if they're going to accept all of this with our
2 changes, I think that was beneficial. I think the
3 fine is not onerous. And then for that I was
4 willing to give on -- my personal approval for the

5 271. But seeing as though nothing's happened, I
6 think we ought to go back to where we started this
7 morning and let's hear a motion and do something and
8 move on.

9 CHAIR KOPPENDRAYER: Ms. Lehr.

10 MS. LEHR: Excuse me. I just wanted to
11 respond to one issue with respect to the access
12 portion. I -- Actually, two things. I don't think
13 it's appropriate to just totally dismiss all issues
14 related to access payments. That is clearly
15 something it applied -- you know, the ALJ found in
16 favor of including those. And for -- I just
17 question sort of the motive of, you know, totally
18 wanting to strip it out but then being willing to
19 give other money. And I think if you cost it out,
20 the proposal, you may find that the 10 percent
21 discount in most instances is very minimal. I have
22 a concern with that.

23 And I guess I would just ask the
24 commission to consider, if you're -- if you're not
25 comfortable, that at a minimum -- you know, Qwest is

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1 saying we're going to appeal because you don't have
2 jurisdiction over interstate, that at a minimum you
3 at least impose the 10 percent discount on the
4 intrastate because you clearly have authority to do
5 that.

6 CHAIR KOPPENDRAYER: You want to state
7 your name and --

8 MR. PELTO: Sure.

9 CHAIR KOPPENDRAYER: You weren't on the
10 record before.

11 MR. PELTO: Tom Pelto, AT&T.

12 CHAIR KOPPENDRAYER: Thank you.

13 MR. PELTO: And --

14 CHAIR KOPPENDRAYER: You had your hand
15 up?

16 MR. PELTO: Yeah, I did. I mean, for me
17 this was sort of taking on an Alice in Wonderland
18 sort of feel. And it appears that that's how some
19 of the commission feels as well. You forgave
20 approximately two-thirds of the restitution by my
21 calculation this morning, offered a significant
22 revenue opportunity to Qwest by giving them a
23 positive vote on 271. They've rejected that. And
24 so the one thing I would point out and underscore is
25 there is very good support in the record. And so to

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1 the extent you still are inclined to go down the
2 road of strengthening your order and backing off
3 what you previously ordered, I would at least
4 suggest that you go with what the ALJ found and
5 findings you adopted on the McLeod agreement, which
6 was in effect from 26th of October, 2000, to the
7 20th of September, 2002. And I concur with the view
8 that it should be applied to all services. And it
9 seems to me there's no point of trading part of an

10 appeal away and not having the rest of it on appeal.
11 It's kind of an all-or-nothing proposition it seems
12 to me.

13 Thank you, Chair.

14 CHAIR KOPPENDRAYER: Well, you
15 understand, of course, we started out with
16 Commissioner Scott wanting to strengthen the
17 proposal in the event of an appeal. So there's some
18 doubt -- There's more doubt probably in some
19 person's part than -- some people's part than on
20 your part as far as prevailing an appeal.

21 MR. PELTO: Well, correct. And I recall
22 last time we sat here at least some of the reasons I
23 heard that you were going down the road of
24 preferring restitution was to encourage that
25 competition that Qwest tried to stifle to tie the

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1 discount to use. Chair Koppendraye, as you pointed
2 out, encourage companies to get in the market and
3 compete aggressively. That would tend to lessen the
4 monopoly that they leveraged here and hopefully
5 prevent this from occurring in the future.

6 We also talked about trying to ruin the
7 business case for breaking the law. They obviously
8 made a business decision here to break the law. And
9 it's better calculated to put money in the pockets
10 of Minnesotans. How are we going to get in and sign
11 up customers? By offering them good deals, the same
12 way we've done it -- every competitor has done it
13 every other time they tried to enter a market.

14 So by -- So it concerns me greatly that
15 you're willing to give away the forward-looking part
16 of the restitution. I understand it's not -- as
17 Commissioner Scott put it, it wasn't because he
18 disagrees; he thinks it's quite appropriately --
19 quite appropriate but is just concerned about it in
20 light of the issues that McLeod and Eschelon have
21 raised. I mean, at this point it seems to me maybe
22 the better course is to send it back to the ALJ for
23 a couple of days of hearing on what these
24 termination payments were about and how much of them
25 were payment in advance of discounts and at least

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1 try and do a more perfect job there of doing the
2 restitution instead of saying because we've got a
3 question and a problem in the record on this
4 forward-looking part of the restitution, we forgive
5 it in its entirety.

6 CHAIR KOPPENDRAYER: Well, I don't want
7 to do that. If you -- If you don't want this, then
8 you get the whole apple; and you can go to court and
9 defend it. It's your battle.

10 MR. PELTO: As Mr. Witt said this
11 morning, we feel like you've got a strong defensible
12 order based on the record that was compiled here.
13 And I don't think a court is going to be looking
14 to -- looking for ways, creative ways to reward

15 Qwest for the behavior it undertook here. And I
16 think your order does a pretty good job of outlining
17 exactly what they did.

18 CHAIR KOPPENDRAYER: It's yours to lose.

19 COMMISSIONER REHA: Mr. Chair.

20 CHAIR KOPPENDRAYER: Commissioner Reha.

21 COMMISSIONER REHA: I was basically with
22 Qwest all the way until they got to the limiting the
23 10 percent discount on 251 services only. And I
24 would support a motion that would limit it to
25 intrastate access, what Mr. Bradley had suggested on

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1 that particular point, and leaving the fine where it
2 is.

3 I was considering staying a portion of
4 the fine -- not to the extent that Mr. Topp has
5 suggested -- you know, if they agreed with what we
6 had proposed. But since they're not, I say we have
7 a much more defensible order, leave the intrastate
8 access in there under our state authority and leave
9 the fine where it sits. And I think we've got a
10 very defensible order. You know, I think we need to
11 emphasize in the order more strongly that the remedy
12 that we're providing is restitutional and not an opt
13 in under 252 and that this could include -- and that
14 we should indicate further that the agreements were
15 never submitted for approval or approved by the
16 commission on its own motion, and they have been
17 terminated; and, thus, 252 is really irrelevant.

18 And so I would support an order on that.
19 And I don't know if we really even need much more
20 discussion.

21 CHAIR KOPPENDRAYER: Well, we allowed the
22 parties to comment. And Mr. O'Brien for the
23 retirees also commented and wishes to make a
24 statement. So --

25 COMMISSIONER REHA: That's fine,

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1 Mr. Chair. I don't mean to cut anybody off. But --
2 But I guess I'm done negotiating.

3 CHAIR KOPPENDRAYER: Mr. O'Brien.

4 COMMISSIONER JOHNSON: That's right.

5 MR. O'BRIEN: I don't mean to chase
6 everybody off here. I had raised my hand earlier
7 when you were asking for parties, but -- It appears
8 we're on line here. Good afternoon, Commissioner
9 Koppendraye and other commissioners. I'm John
10 O'Brien representing the U S WEST/Northwestern Bell
11 Retiree Association. I appreciate the opportunity
12 to address you. May have been more appropriate
13 before the break, but I appreciate the opportunity
14 here.

15 I have modified my comments to better
16 address the changes being discussed so far today.
17 The retirees applaud -- The retirees applaud the
18 commission's willingness to reconsider its order.
19 The current order set penalties higher than Qwest is

20 able to accept without further challenge in the
21 court system. That seems obvious.
22 The commission should modify penalties
23 such that they will allow resolution in this matter.
24 Resolution is far better than continued
25 confrontation. The commission should consider a

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1 couple of key items; and that's the level of the
2 penalties, which you're doing, as well as penalties
3 for McLeod and Eschelon.

4 Qwest argues that the level of penalties
5 ordered by the commission are well beyond what the
6 statute allows. The retirees have not attempted to
7 interpret the statutes that are currently being
8 discussed; however, we are concerned that they need
9 to be considered fully here before decisions are
10 made. The damages that resulted from the unfiled
11 agreements that were in effect for McLeod and
12 Eschelon provided the CLEC with some key contracted
13 services. Qwest has offered to try to make right
14 some of those inconsistencies and whatnot that have
15 been offered to the parties in those contracts. In
16 fact, they continue to offer, with their latest
17 presentation here, further modifications.

18 Regardless of the commission's final
19 determination of its penalties against Qwest in this
20 docket, it's essential that the impropriety of
21 McLeod and Eschelon be addressed as well. Qwest
22 could not have acted unilaterally in executing the
23 unfiled agreements. It would be patently unfair to
24 penalize only Qwest for the unfiled agreements.
25 McLeod and Eschelon were probably willing to

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1 discontinue the unfiled agreements because they
2 realized they were not enforceable anyway.

3 Until today the commission has only
4 addressed concerns about actions of Qwest's new
5 managers and assurances that things have changed.
6 Qwest has admitted it's done wrong. It dismissed
7 the managers responsible for negotiating the unfiled
8 agreements.

9 COMMISSIONER JOHNSON: Not all of them.

10 MR. O'BRIEN: Well, if I might continue.

11 COMMISSIONER JOHNSON: Go ahead.

12 MR. O'BRIEN: They've also offered --

13 COMMISSIONER JOHNSON: I'm just saying
14 that's wrong.

15 MR. O'BRIEN: -- the means for the
16 commission to monitor future actions. Qwest has
17 come forward to accept the penalties, although they
18 continue to be concerned about the level. On the
19 other hand I've heard really nothing from McLeod
20 regarding the dismissal of its managers responsible
21 for unfiled agreements or admission of guilt or
22 assurance of fair competition in the future. It
23 appears they have changed nothing and will be spared
24 retributions. Rather than being subject to

25 penalties, it appears that McLeod and Eschelon are
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1 very active in pursuing the maximum benefit to be
2 derived from the commission's penalty of Qwest. I
3 am pleased that the commission today is focusing
4 some attention on this issue.

5 What about the consumers? The future
6 telecommunications in Minnesota is at risk, at least
7 in the nonmetro exchanges. There appears no great
8 desire by any other providers to take over the
9 responsibility of serving many of the nonmetro
10 exchanges. Who will take over the responsibility if
11 Qwest is overburdened by penalties ordered by the
12 commission and reduces its presence in Minnesota?
13 Ultimately it appears consumers will have to rely on
14 a trickle-down benefit from the competitive service
15 providers if they choose to share at all.
16 Regardless if penalties are unreasonably harsh, the
17 consumers will be the ultimate losers.

18 In conclusion the penalty should be
19 reasonable and not based on what the maximum amount
20 the commission thinks Qwest can sustain. Otherwise,
21 the dispute will continue indefinitely. The
22 commission is understandably angry about the actions
23 of former Qwest executives. However, this should
24 not require the new managers to blindly accept the
25 level of penalty that is unreasonably harsh. The

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1 new managers would be negligent in their
2 responsibility if they did not pursue a more
3 reasonable outcome in this matter, given the
4 evaluation of the law.

5 Promoting long-term health in
6 telecommunications should be uppermost in the
7 commission's goal. The February 28th, 2000 order as
8 it stands will not resolve this matter and allow the
9 parties to concentrate on serving the
10 telecommunication needs of the consumers.
11 Establishment of a more reasonable level of
12 penalties will help the commission better serve
13 their constituents, the consumers.

14 Thank you very much for allowing the
15 retirees to present our comments in this matter.
16 I'll be happy to answer questions the commission may
17 have.

18 CHAIR KOPPENDRAYER: Thank you.
19 Questions for Mr. O'Brien?

20 COMMISSIONER JOHNSON: No.

21 MR. O'BRIEN: Thank you.

22 MR. BRADLEY: Mr. Chairman.

23 CHAIR KOPPENDRAYER: Mr. Bradley.

24 MR. BRADLEY: A correction. Sorry to
25 deal with the minutia here. The offset for the \$2

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1 should have read -- and I do this for Mr. Brown's
2 benefit more than anyone's -- the \$2 payment shall
3 be offset by the amount collected by the affected

4 CLECs from Qwest for the terminating access services
5 for which the payment was intended to apply. And
6 we'll provide that language.

7 COMMISSIONER REHA: Mr. Chair.

8 CHAIR KOPPENDRAYER: Commissioner Reha.

9 COMMISSIONER REHA: Could Mr. Bradley
10 take a stab at proposing some language with respect
11 to the access intrastate, having it apply only to
12 intrastate instead of interstate on that particular
13 point?

14 MR. BRADLEY: Certainly.

15 COMMISSIONER SCOTT: As part of that
16 could I ask are interstate access rates tariffed at
17 the state level?

18 COMMISSIONER REHA: No.

19 MR. BRADLEY: No, they are not. They're
20 tariffed and filed at the FCC.

21 COMMISSIONER SCOTT: Totally?

22 COMMISSIONER REHA: Right.

23 MR. BRADLEY: Completely.

24 COMMISSIONER REHA: That's one of my
25 concerns that I have on that, but --

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1 CHAIR KOPPENDRAYER: Why are we going
2 there if we're not going to change the order?

3 COMMISSIONER REHA: I want to change the
4 order.

5 COMMISSIONER JOHNSON: She's thinking
6 about changing it.

7 CHAIR KOPPENDRAYER: Oh.

8 COMMISSIONER REHA: I don't want to go
9 back to square one.

10 CHAIR KOPPENDRAYER: I thought you wanted
11 to go back to --

12 COMMISSIONER REHA: Not --

13 CHAIR KOPPENDRAYER: -- square one.

14 COMMISSIONER REHA: -- me. No.

15 CHAIR KOPPENDRAYER: Okay.

16 COMMISSIONER REHA: I think the order
17 that we have now -- I said I was with Qwest until
18 that one particular item and then on the level of
19 the penalty. I think we have a much more defensible
20 order as we've discussed here today with a few
21 additional changes. But I'm not prepared to only
22 limit the 10 percent discount to 251 services.

23 CHAIR KOPPENDRAYER: Okay.

24 COMMISSIONER SCOTT: You are not?

25 COMMISSIONER REHA: Correct.

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1 COMMISSIONER SCOTT: But you would cut
2 back the access to in --

3 COMMISSIONER REHA: That's correct.

4 COMMISSIONER SCOTT: See, there's
5 something about that --

6 COMMISSIONER REHA: Is there a disconnect
7 here?

8 COMMISSIONER SCOTT: -- that I

9 understand, but it just bugs me that that's --
10 that's -- that's not what Eschelon got. They got
11 the whole kit and caboodle.
12 COMMISSIONER REHA: But I don't know if
13 we have the authority to order that.
14 COMMISSIONER SCOTT: Boy, I bet we do. I
15 bet we do.
16 COMMISSIONER REHA: Well, we could
17 certainly test it. But I'd certainly like to hear
18 the language that Mr. Bradley recommended.
19 MR. BRADLEY: The language, if you went
20 to 3A on the second line: Discount on all Minnesota
21 products and services, excluding interstate access
22 services.
23 It's my understanding -- Commissioner
24 Scott, with regard to that last issue, it's my
25 understanding that there's a recent federal district
0089 court decision that did limit the commission's
1 jurisdiction on a combined service to just the
2 intrastate.
3
4 COMMISSIONER SCOTT: On -- In what
5 context?
6 MR. BRADLEY: Well, I --
7 COMMISSIONER SCOTT: In the context where
8 an officer of a company under oath lies about the --
9 I mean, you know, come on.
10 MS. LEHR: It was only on measures.
11 MR. BRADLEY: It's not my role to argue
12 for Qwest, and I don't mean to.
13 COMMISSIONER SCOTT: Yeah. Well, I mean,
14 that there's a case that says words like that I
15 don't doubt. But whether it has any applicability
16 here --
17 MS. LEHR: Commiss --
18 COMMISSIONER SCOTT: -- I do doubt.
19 MS. LEHR: Commissioner Scott.
20 CHAIR KOPPENDRAYER: Ms. Lehr.
21 MS. LEHR: I would actually like to make
22 a comment on that. That order related only to the
23 commission's ability to require reporting of
24 interstate services. I mean, if Qwest is arguing
25 that the commission now can't do anything with
0090 respect to any kind of interstate service, I think
1 that we might have some issues here. There are a
2 lot of things that are handled by the -- by this
3 commission, like the Minnesota-specific slamming
4 rules and -- I mean, there are a lot of interstate
5 types of services and things that this commission
6 does have jurisdiction over. So I don't think it's
7 appropriate for Qwest to use that example all the
8 sudden now to say the commission has no jurisdiction
9 over anything that has interstate. I think
10 Mr. Bradley's language would serve the purpose.
11 And, Commissioner Scott, it bugs me too;
12 but, I mean, I'd rather have something than nothing.
13

14 CHAIR KOPPENDRAYER: Mr. Pelto.
15 MR. PELTO: If I -- First of all, Chair
16 Koppendraye, to Commissioner Scott's point, it was
17 a dramatically different case there. You didn't
18 have the record and the evidence of significant,
19 intentional, willful wrongdoing that you have here.
20 So if there was ever a case that would scream out
21 for remedying discrimination that took place within
22 the four corners of Minnesota -- You're not talking
23 about crossing state lines here. This would all be
24 for calls, services that originated or terminated in
25 this state. So the discrimination touched this

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1 state, and I don't think this commission in this
2 case should trade away the authority to remedy
3 discrimination that took place in its borders on
4 this record.

5 You know, second of all, the other thing
6 I would point to is in page 5, second paragraph,
7 where you go and cite to the McLeod order, 694 days.
8 I'm still at a loss to understand why the commission
9 would exhibit this gratuitous kindness of saying --
10 You know, I understand why you would want to have an
11 appeal-proof record. But you've got it right there.
12 You found a violation that continued for 694 days, a
13 10 percent discount on all services. And why to --
14 why shorten that I fail to understand.

15 CHAIR KOPPENDRAYER: Other concerns?

16 COMMISSIONER SCOTT: No.

17 CHAIR KOPPENDRAYER: Commissioner Reha?

18 COMMISSIONER REHA: Well, I'm not that
19 hung up whether it's 16 months or 18 months. I have
20 a problem with the 24 months. But I like the
21 proposed language that Mr. Bradley came up with, the
22 \$2 offset, the \$13 credit, \$16 credit. I think the
23 time frame -- nobody really addressed the specific
24 time frames that Qwest had proposed on those, but
25 I'm comfortable with that. I've always been

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1 comfort -- uncomfortable with the going-forward
2 penalty. And I wasn't too sure of that the first
3 time we sat through this. And especially now with
4 the Eschelon and McLeod affidavits and arguments,
5 I'm more uncomfortable with it than I was
6 previously. But I think we've crafted a pretty
7 good order here that clarifies and is more measured
8 and thoughtful and is consistent with the record.
9 And -- And I know Qwest didn't think that we said
10 enough in our transcript on the issues related to
11 the amount of the penalty, but in my own mind I went
12 through every one of those factors in subdivision 2
13 and felt that -- and feel that the penalty that we
14 came up with is consistent with subdivision 2. And
15 I'd be glad to enumerate those if -- if the chair
16 would like me to do that. But I think our record is
17 solid on that.

18 We talked about the less serious

19 penalties at \$100 a day; and we took the more
20 conservative approach to the length of period for
21 the penalties; and then the most serious of the two
22 violations, we put a \$2,500 day per violation on
23 those for the length of the period of the
24 violations, and it came out to, as I recall, 20 --
25 what was it 25,000 -- oh, I think it was --

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1 COMMISSIONER JOHNSON: 2,500.

2 COMMISSIONER REHA: -- 2,500 a day for
3 the ten violations and 10,000 per day for the two;
4 and we came up with \$25.96 million. I think that's
5 defensible.

6 CHAIR KOPPENDRAYER: You just have
7 enumerated them.

8 COMMISSIONER REHA: Right.

9 CHAIR KOPPENDRAYER: All right.

10 COMMISSIONER SCOTT: Mr. Chair.

11 CHAIR KOPPENDRAYER: Commissioner Scott.

12 COMMISSIONER SCOTT: I -- If I might
13 summarize where I think we're headed, and then folks
14 can tell me if they agree or not. Looking at our
15 February 28th order, starting on page 20 with the
16 ordering paragraphs, paragraphs 1 and 2 would remain
17 unchanged. Paragraph 3, the third line -- I'm
18 sorry, paragraph 3A, the third line, the
19 November 15th, 2000 date would remain; the
20 November 15th, 2002 date would be changed to
21 May 15th, 2002. That would be a period of 18
22 months. Moving then to paragraphs 3B through D, we
23 would pick up on the Bradley language. I had
24 written originally with the Crain amendment. But
25 then I think you changed something that incorporated

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1 the Crain language, didn't you?

2 MR. BRADLEY: No. Mr. Crain's amendment
3 on the 13 and 16 also need to be made.

4 COMMISSIONER SCOTT: All right. So it's
5 the Bradley language with the Crain amendment.

6 CHAIR KOPPENDRAYER: Why don't you read
7 it for the record?

8 MR. BRADLEY: Certainly. I previously
9 read the \$2 one. The 13 and \$16 payment shall be
10 offset by the amounts billed by the affected CLECs
11 for the originating and terminating access services
12 for which the payment was intended to apply.

13 CHAIR KOPPENDRAYER: And then for 3B, C,
14 and D there's no mention of offset.

15 COMMISSIONER SCOTT: That's -- The
16 Bradley language takes care of that.

17 CHAIR KOPPENDRAYER: That's --

18 COMMISSIONER SCOTT: That's what that's
19 intended to do.

20 MR. BRADLEY: Mr. Chair, the -- with
21 respect to 3B, the \$2 payment shall be offset by the
22 amounts collected by the affected CLECs from Qwest
23 for the terminating access services for which the

24 payment was intended to apply.
25 CHAIR KOPPENDRAYER: All right.
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1 MR. BRADLEY: For 3C that was the 13 --
2 \$13, and I previously just read that. And for 3D
3 that's the \$16, and I previously just read that.
4 CHAIR KOPPENDRAYER: Thank you.
5 COMMISSIONER SCOTT: Peter, you okay with
6 that?
7 MR. BROWN: Yeah.
8 COMMISSIONER SCOTT: Okay.
9 MR. BROWN: I'll get a copy of it.
10 COMMISSIONER SCOTT: All right. So then
11 number 4 is deleted; and, again, from my perspective
12 not because of a lack of authority, but because of a
13 lack of facts. Number 5 is also deleted. Number 6
14 remains, except we put a period after the first
15 sentence, and that's the end of the sentence. I
16 guess I shouldn't say a period after the end of the
17 sentence. Everything after the first sentence is
18 deleted because it refers to the future, forward
19 looking, and it would not be relevant.
20 CHAIR KOPPENDRAYER: It would just read
21 Eschelon and McLeod shall not be eligible for
22 payments or credits under order paragraphs 3A
23 through D?
24 COMMISSIONER SCOTT: Yes. And I would
25 also reiterate what Commissioner Reha said earlier,
0096
1 that we're operating here in a remedial mode. We're
2 not in a 251 mode. When Qwest decided not to file
3 these agreements, it took us out of that mode. And
4 now we're acting under our state law remedial
5 authority.
6 COMMISSIONER JOHNSON: That's a good
7 point.
8 COMMISSIONER SCOTT: I also wonder if we
9 shouldn't put a time frame on the 3A through D
10 issues in this sense: Qwest says in its 271 filing
11 that there are 62 CLECs actively doing business in
12 Minnesota. That would mean that, in theory, there
13 are 62 potential companies who did business with
14 Qwest during the time frame under 3A. That would
15 mean that -- I think it raises an issue about
16 whether those companies should get notice from
17 Qwest, because they know who they did business with
18 during that period of time, as to the availability
19 of this remedy. And also I think, if we're going to
20 have Qwest give notice, there should be a point
21 where people can no longer make the claim; that
22 Qwest should know that there's some certainty here
23 that after a certain date they've paid what they're
24 going to pay under this.
25 So my thought was that we should add
0097
1 something by which Qwest gives notice to CLECs who
2 purchased any product or services that might be

3 covered under the terms of this order during the
4 relevant time frame and that Qwest's liability under
5 the order terminates at some date that I frankly
6 don't know what's fair. I don't know if it's a
7 year, if it's two years. I don't know what it is.
8 I just know at some point everybody that's going to
9 make a claim should make a claim and it should be
10 done.

11 COMMISSIONER JOHNSON: Mr. Chair,
12 Commissioner Scott, wouldn't it be nice to have a
13 little accounting so we know what happened at that
14 same -- in your same time period?

15 COMMISSIONER SCOTT: Have -- You mean
16 have people come back and tell us how this was
17 implemented in reality?

18 COMMISSIONER JOHNSON: Correct.

19 COMMISSIONER SCOTT: Yeah, I think that's
20 a good idea.

21 CHAIR KOPPENDRAYER: It's -- Isn't it
22 difficult to put times or even -- Are you saying
23 they have to notify 62 companies before they
24 exercise the right of appeal?

25 COMMISSIONER SCOTT: I don't know what

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1 the timing is vis-a-vis the appeal. I just think
2 that if we're going to have this relief that's
3 available to the CLEC community, we should give
4 notice to the CLEC community about it. And -- But I
5 also think Qwest is entitled at some point to know
6 that people can't dust this order off and say, Oh,
7 by the way, we were in business back during this
8 period of time and we get to recover under it.

9 COMMISSIONER JOHNSON: That's fair.

10 CHAIR KOPPENDRAYER: But --

11 COMMISSIONER SCOTT: Qwest would know
12 who -- who --

13 CHAIR KOPPENDRAYER: I under --

14 COMMISSIONER SCOTT: -- did business. So
15 it seems like, you know, requiring them to give
16 notice but then saying people have to make their
17 claims within a certain period of time.

18 CHAIR KOPPENDRAYER: But that certain
19 period of time would -- you would set a time frame
20 perhaps of months on it; but that would then
21 basically start not as of this order, but as of the
22 satisfactory resolution of appeal.

23 COMMISSIONER JOHNSON: I think it's --

24 CHAIR KOPPENDRAYER: Because --

25 COMMISSIONER JOHNSON: -- protection for

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1 the company --

2 CHAIR KOPPENDRAYER: Because --

3 COMMISSIONER JOHNSON: -- is what he's
4 trying to get at.

5 CHAIR KOPPENDRAYER: Ms. Lehr, you

6 wanted --

7 COMMISSIONER JOHNSON: Which is fine.

8 MS. LEHR: I just wanted to note that I
9 didn't know if Mr. Bradley's language in 3A relating
10 to the interstate access --
11 MR. BROWN: Can't hear it.
12 MS. CUMMINGS: We can't hear you.
13 MS. LEHR: Oh, sorry. The language for
14 3A that Mr. Bradley suggested with respect to access
15 I don't think was repeated.
16 CHAIR KOPPENDRAYER: It was repeated
17 three times.
18 COMMISSIONER SCOTT: I didn't ask for the
19 language on access for 3A.
20 MS. LEHR: Okay.
21 CHAIR KOPPENDRAYER: Mr. Bradley.
22 MR. BRADLEY: Commissioners, the
23 commission adopted a true-up process for UNEs, which
24 your staff would probably know better than I; but my
25 recollection is it provided that Qwest had 60 days
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1 to advise the CLECs of the true-up amount as a
2 result of implementing the new UNEs in which -- then
3 the CLECs had roughly 60 days to respond to Qwest,
4 and then 30 days after that Qwest had to file a
5 compliance filing with the commission. I was merely
6 going to suggest you might want to use the same
7 process; and your staff would be able to revive
8 that, I'm sure.
9 COMMISSIONER SCOTT: That -- That's fine
10 with me. But is 60 days enough?
11 MR. TOPP: I really don't know. I know
12 that with respect to the cost docket order, we're
13 really struggling to meet the 60 days.
14 COMMISSIONER SCOTT: Yeah, I was thinking
15 we should make it 90. Go 90, 90 --
16 COMMISSIONER REHA: At least, yeah.
17 COMMISSIONER SCOTT: 90, 90, 30.
18 COMMISSIONER JOHNSON: Maybe 90 isn't
19 enough.
20 COMMISSIONER SCOTT: Yeah, I don't know.
21 But we can -- If people need relief, they can come
22 in and ask for it, I guess. But -- So I would add
23 that; that Qwest provides notice to the CLECs who
24 may have done business with them during the relevant
25 time period within 90 days, those folks then have 90
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1 days to make their claims, and then we got a
2 compliance filing.
3 MR. BRADLEY: The small refinement was I
4 think that Qwest should propose an amount to them in
5 90 days.
6 COMMISSIONER SCOTT: Oh, I see.
7 MR. BRADLEY: Qwest would propose an
8 amount within 90 days. They know how much they
9 billed us. They've got the records.
10 COMMISSIONER SCOTT: That's true.
11 COMMISSIONER JOHNSON: That's a good --
12 CHAIR KOPPENDRAYER: Mr. Pelto, you

13 had -- you had a comment.
14 MR. PELTO: That sounds like a fine
15 proposal there. I was just going to suggest that
16 you not say anything about the effectiveness, the
17 obligations and tying it to the appeal. We'll have
18 a final order from the commission. Carriers can
19 make their own determination whether they need sit
20 around for the appeal process to run before they
21 exercise the credits.
22 COMMISSIONER SCOTT: Peter, are you okay
23 with that, the 90, 90, 30?
24 MR. BROWN: Yes. Right.
25 COMMISSIONER SCOTT: And the first 90 is
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1 Qwest recommending a number, offering a number.
2 MR. TOPP: The one difficulty with that
3 is where you've got offsets. I mean, we're not
4 going to know how much the CLEC billed and that sort
5 of thing. So it's -- We can't just on our own come
6 up with a number in the first 90 days.
7 COMMISSIONER SCOTT: Because why again?
8 MR. TOPP: Because --
9 COMMISSIONER REHA: The offset.
10 MR. TOPP: -- the \$13 and \$16 credits
11 aren't just a straight \$13, \$16. It's \$13 less the
12 amount that the CLEC billed --
13 COMMISSIONER REHA: They don't
14 know the --
15 MR. TOPP: -- to IXCs, which is not a
16 billing that we would have done.
17 COMMISSIONER SCOTT: Yeah, I see what
18 you're saying.
19 COMMISSIONER JOHNSON: So how do you
20 correct that?
21 COMMISSIONER REHA: Well, then they need
22 to propose a certain amount; then the company -- the
23 competitor comes back then.
24 COMMISSIONER SCOTT: Yeah, I guess.
25 CHAIR KOPPENDRAYER: You'll have to
0103
1 negotiate it.
2 MR. TOPP: Yeah.
3 MR. BRADLEY: Exactly. Qwest will say --
4 CHAIR KOPPENDRAYER: And if time runs out
5 while you're negotiating, we'll --
6 MR. TOPP: Okay.
7 MS. LEHR: Don't say that.
8 COMMISSIONER SCOTT: If -- If that
9 generally comports with what folks are thinking,
10 I'll move it.
11 COMMISSIONER JOHNSON: Sounds good.
12 CHAIR KOPPENDRAYER: Any other discussion
13 of the motion?
14 Mr. Brown, are you comfortable?
15 MR. BROWN: Yes.
16 COMMISSIONER REHA: Mr. Chair --
17 CHAIR KOPPENDRAYER: Commissioner Reha.

18 COMMISSIONER REHA: -- Chair
19 Koppendraye, I was wondering if we need to deal in
20 this motion or in a separate motion about what to do
21 with Eschelon and McLeod on a going-forward basis in
22 terms of closing the investigation.
23 COMMISSIONER SCOTT: I think separately.
24 COMMISSIONER REHA: Separately. Okay.
25 CHAIR KOPPENDRAYER: They're just flat
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1 out of this one, whether -- whether they want to --
2 COMMISSIONER REHA: Fine. You're right.
3 CHAIR KOPPENDRAYER: All in favor of the
4 motion signify by saying aye.
5 ALL COMMISSIONERS: Aye.
6 CHAIR KOPPENDRAYER: Opposed same sign.
7 Motion carries 4/0.
8 COMMISSIONER JOHNSON: I was hoping it
9 wouldn't turn out that way, that we would have had
10 that all settled and let the company move on in a
11 new -- whole new wave. But here we go.
12 CHAIR KOPPENDRAYER: Mr. Oberlander, I
13 believe that brings us to item number 2.
14 MR. OBERLANDER: Commissioners, just a
15 point of clarification. I'm not sure in my own mind
16 if the commission intentionally -- or has completed
17 its discussion regarding the roles played by the
18 CLECs and is ready to move on to item number 2.
19 COMMISSIONER REHA: Are you referring to
20 the Eschelon/McLeod --
21 MR. OBERLANDER: Yes.
22 COMMISSIONER REHA: -- item?
23 Well, Mr. Chair, if a motion's in order
24 at this point, I would move that we -- and I don't
25 know how to say this -- that we -- I think the
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1 department has an open docket potentially to
2 investigate McLeod and Eschelon with respect to
3 their participation in the unfiled agreements. And
4 I would -- I would move that any investigation be
5 closed.
6 CHAIR KOPPENDRAYER: You're --
7 Commissioner Reha, you're moving that that docket
8 that the department open we close?
9 COMMISSIONER REHA: Right. I think --
10 Didn't we -- Give me some -- What --
11 MR. OBERLANDER: Commissioners, staff has
12 provided brief information about this as issue E in
13 the briefing papers. If you look on page 29, staff
14 did have some proposed options for the commission.
15 COMMISSIONER REHA: Okay.
16 CHAIR KOPPENDRAYER: My understanding
17 though is that the department hasn't pursued that
18 investigation. They have a docket, but they're
19 not -- they haven't done nothing with it.
20 Mr. Doyle.
21 MR. DOYLE: Mr. Chair, the department was
22 essentially waiting for the outcome of this. And at

23 this time the docket is still open. It is a
24 department investigation, and I think the department
25 would be the one to close it. But if that's the

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1 direction that the commission wishes to go, we
2 certainly will do that.

3 COMMISSIONER REHA: I think in the
4 briefing papers at issue E it does say, Should the
5 commission open an investigation at the role played
6 by CLECs in the unfiled agreements matter. And I
7 would move --

8 CHAIR KOPPENDRAYER: Say no.

9 COMMISSIONER REHA: -- E-3, no, do not
10 pursue an investigation in --

11 CHAIR KOPPENDRAYER: E.

12 COMMISSIONER REHA: -- this matter.

13 CHAIR KOPPENDRAYER: Okay. Then we're
14 simply -- That's simply advice to the department?

15 COMMISSIONER SCOTT: Right.

16 COMMISSIONER REHA: Correct.

17 COMMISSIONER SCOTT: And I also think we
18 should be careful not to have in this order any
19 language about the commission having done something
20 to penalize McLeod or Eschelon.

21 COMMISSIONER REHA: I agree.

22 COMMISSIONER SCOTT: This was not a
23 penalize McLeod or Eschelon docket.

24 COMMISSIONER REHA: I agree.

25 COMMISSIONER SCOTT: But I'm fine

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1 supporting the motion.

2 CHAIR KOPPENDRAYER: Any other
3 discussion?

4 All in favor signify by saying aye.

5 ALL COMMISSIONERS: Aye.

6 CHAIR KOPPENDRAYER: Motion carries 4/0.
7 (Proceedings concluded at 1:50 p.m.)

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1 STATE OF MINNESOTA)

COUNTY OF SCOTT) ss.
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REPORTER'S CERTIFICATE

I, Angie D. Threlkeld, do hereby certify that the above and foregoing transcript, consisting of the preceding 107 pages is a correct transcript of my stenographic notes, and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated April 10, 2003.

ANGIE D. THRELKELD
Registered Professional Reporter
Certified Realtime Reporter